Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

JOYCE A. GILCHRIST, Petitioner,

v.

BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State violates a person's First Amendment rights when it deprives that person of a state benefit because the person testified as an expert witness in State Criminal trials, and those expert opinions were criticized.

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PETITION FOR A WRIT OF CERTIORARI

Melvin C. Hall, counsel of record; and Gisele K. Perryman, assisting on the filings and briefs, on behalf of Petitioner, Joyce A. Gilchrist, respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Oklahoma.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported at *Gilchrist v. Board of Review of the Oklahoma Employment Security Comm'n*, 94 P.3d 72, 2004 OK 47.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on June 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257.

CONSTITUTIONAL PROVISION INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

STATEMENT

This case involves the application of the First Amendment right to testify as an expert witness in State criminal trials; and whether a State violates a person's First Amendment rights when it deprives that person of a state benefit because the person testified as an expert witness in State Criminal trials, and those expert opinions were criticized.

Petitioner, Joyce Gilchrist, worked for the City of Oklahoma City Police Department (OCPD) as a forensic chemist for many years. Petitioner was responsible for collecting and analyzing evidence from crime scenes and testifying as to the results in criminal prosecutions. Petitioner was terminated in 2001, in part based on United States Western District of Oklahoma Judge Ralph Thompson's published opinion in a *habeas corpus* proceeding, *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. 1999). The issues before Judge Thompson arose from a criminal matter tried in the District Court of Oklahoma County in which Petitioner had testified for the prosecution as an expert witness. Based on his analysis of the evidence developed in the *habeas corpus* matter, Judge Thompson concluded that Petitioner's testimony in the 1992 criminal trial concerning DNA evidence had been, "without question untrue," 150 F. Supp. 2d at 1226, and "terribly misleading, if not false," 150 F. Supp. 2d at 1229. Petitioner was then terminated for her expert witness testimony. Petitioner filed a claim with the Oklahoma Employment Securities Commission (OESC) seeking unemployment benefits. On October 15, 2001, the OESC denied Petitioner's claim based on the OESC's conclusion that Petitioner had been fired for misconduct. On October 25, 2001, Petitioner appealed to an Appeal Tribunal of the OESC. On December 12, 2001, a hearing was held before an Appeal Tribunal hearing officer, who affirmed the OESC's determination on February 4, 2002.

Petitioner appealed from the Appeal Tribunal's order and on April 26, 2002, the OESC Board of Review affirmed. Petitioner filed her petition for judicial review in the District Court of Oklahoma County on May 7, 2002. The trial court affirmed the opinion of the Board of Review on October 29, 2002. Petitioner appealed the District Court's affirmation to the Oklahoma Supreme Court on November 13, 2002. On June 15, 2004, the Oklahoma Supreme Court issued its final decision, affirming the Oklahoma County District Court's opinion.

Petitioner's speech in the form of expert witness testimony encompassed a matter of public concern.

> The function of witnesses is fundamental to the administration of justice. The court's judgment is based on [witnesses'] testimony and they are given every encouragement to make a full disclosure of all pertinent information within their knowledge. ... "[E]very consideration of public policy requires that they should be as fearless in testifying as the judge and jury are independent in weighting their testimony."

Williams v. Hepting, 844 F.2d 138, 141 (3rd Cir. 1988), *quoting Brawer v. Horowitz*, 535 F.2d 830, 837 (3rd Cir. 1976). "In order to encourage truthful and uninhibited testimony, the law has long afforded certain protections to witnesses." *Worrell v. Henry*, 219 F.3d 1197, 1204 (10th Cir. 2000). "Under common law, witnesses were immune from suit for damages for testifying in judicial proceedings." *Worrell*, 219 F.3d at 1204, *citing Briscoe v. LaHue*, 460 U.S. 325, 330-331, (1983). This immunity is even applied to public officials who knowingly give false testimony. *Briscoe*, 460 U.S. at 345. Public policy "requires that the paths which lead to the ascertainment of the truth should be left as free and unobstructed as possible."

Briscoe, 460 US. at 333, *citing Calkins v. Sumner*, 13 Wis. 193, 197 (Wis. 1860). Speech concerning public affairs, such as testimony, is more than self-expression; it is the essence of self-government. "Accordingly, the [United States Supreme] Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) *quoting NAACP v. Clairborn Hardware Co.*, 458 U.S. 886, 913 (1982), and *Carey v. Brown*, 477 U.S. 455, 467 (1980).

"In the last few decades, federal courts have afforded additional protection to witnesses who are employed by the government, concluding that truthful testimony is protected by the First Amendment and that a government employee may **not** be fired or subjected to other adverse action as a result of such testimony." *Worrell*, 219 F.3d at 1204-1205 (emphasis added). *See also Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989), *vacated on other grounds*, 928 F.2d 920 (10th Cir. 1991) (*en banc*). These decisions are particular applications of the "modern unconstitutional conditions doctrine," which holds that the "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996), *quoting Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Pursuant to the modern unconstitutional conditions doctrine, the Oklahoma Supreme Court should have reversed the denial of the benefit of unemployment compensation to Petitioner because of her courtroom testimony. For the Oklahoma Supreme Court to affirm the denial of Petitioner's unemployment benefits, it infringes upon her constitutionally protected freedom of speech. *See Umbehr*, 518 U.S. at 674.

The denial of Petitioner's unemployment benefits, as a result of her testimony, constitutes "other adverse action" under *Worrell.* "[A]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation and legal harassment, constitutes an infringement of that freedom." *Worrell,* 219 F.3d at 1212.

In *Worrell*, the Tenth Circuit ruled that the plaintiff had a First Amendment right to express his opinion in the form of testimony. The court stated:

> The goal of our criminal justice system is to arrive at the truth and the interest of the parties in the case are furthered by witnesses who provide testimony to assist the trier of fact, Mr. Worrell's testimony is thus entitled to heightened protection under our precedent.

Worrell, 219 F.3d at 1209. As applied to the instant case, because Petitioner provided testimony to assist the trier of fact, her opinions in the referenced criminal cases where she testified are entitled to "heightened protection." Consequently, speech in the form of testimony is constitutionally protected as a matter of law. *Copp v. Unified School Dist. No. 501*, 882 F.2d 1547, 1550 (10th Cir. 1989).

This Court has recognized that constitutional violations may arise from the deterrent or chilling effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights. *Umbehr*, 518 U.S. at 674. Clearly, the Oklahoma Supreme Court's opinion denying unemployment benefits due to Petitioner's courtroom testimony has a deterrent and chilling effect on government employees summoned to testify. The Oklahoma Supreme Court's denial of Petitioner's unemployment benefits would violate government employees'

First Amendment constitutional right to testify.

It is important to remember that the two cases cited by the Oklahoma Supreme Court where Petitioner testified as an expert witness, her opinion testimony was subjected to various "truth-finding safeguards of the judicial process" that decreased the likelihood that perjured testimony would significantly harm or alter a just outcome of the trial. At trial, witnesses must take an oath, are subjected to cross examination, and are scrutinized for credibility by the trier of fact. *See Briscoe*, 460 U.S. at 344-345. The witness may also be prosecuted subsequently for perjury. *Briscoe*, 460 U.S. at 342. In the instant case, Petitioner never was prosecuted for perjury.

As applied to the instant case, it is reasonable to assume that Petitioner's testimony was subjected to the various truth-finding safeguards outlined above that are inherent in the judicial process. It was the criminal district court, and **not** the Oklahoma Supreme Court that was in a better position to evaluate the appropriateness of Petitioner's testimony and to penalize Petitioner using the "truth-finding safeguards of the judicial process." In none of the criminal cases where Petitioner testified as an expert witness was she penalized for her testimony. It constitutes a violation of First Amendment constitutional law for the Oklahoma Supreme Court to penalize Petitioner by finding misconduct based on her expert opinion testimony.

Strong public policy considerations support the reasons for protecting government employees' testimony.

> Absent such protection, employers seeking to silence truthful testimony could present employees with a difficult choice. "Employees

> could either testify truthfully and lose their job or could lie to the tribunal and protect their job security." Either choice would come at too high a price: "Those able to risk job security would suffer **state sponsored retaliation** for speaking the truth before a body entrusted with the task of discovering the truth." On the other hand, "[t]hose unwilling or unable to risk unemployment would scuttle the courts efforts to arrive at the truth." Affording constitutional protection to the truthful testimony of public employees protects both employees interest in free expression and the judicial systems interest in arriving at the truth.

Worrell, 219 F.3d at 1205, *quoting Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989) (emphasis added). Because she exercised her First Amendment right to testify as an expert witness and expressed her opinion in a criminal trial, Petitioner, a former government employee, has suffered **state sponsored retaliation** from the Oklahoma Supreme Court. "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

Pursuant to Oklahoma Supreme Court precedent, the Oklahoma Supreme Court is constitutionally disqualified from penalizing Petitioner for her protected speech in the form of testimony. Because she exercised her constitutionally protected right to testify in criminal trials, the Oklahoma Supreme Court, in its opinion regarding Petitioner, denied her a government benefit. This result is "absolutely inimical to the principles of

the First Amendment. In the realm of protecting speech, the government is constitutionally disqualified from dictating the subject about which persons may speak and the speakers who may address a public issue." *Oklahoma Bar Ass'n v. Porter*, 1988 OK 114, ¶ 20, 766 P.2d 958, 967. This Court has even stated that a fundamental principle of the criminal court system is that "the *jury* is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1998). In determining the weight and credibility of witness testimony, it has been held that "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Scheffer*, 523 U.S. at 313 *quoting Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

Moreover, the Oklahoma Supreme Court's opinion fails to take into account rights other than the right of Petitioner. "The counterpoint to the right to speak is the right of the listener"—in this case, that would be the judge, the jury, and the public—in listening to the Petitioner's opinion testimony. *Porter*, 1988 OK 144, ¶ 21. "The First Amendment goes beyond protection of the press and individual self-expression to prohibit the government from limiting the stock of information from which the members of the public may draw." *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765 (1978). "The concomitant right to receive information has been referred to as the freedom to listen. The freedom of speech necessarily protects the right to receive that information." *Martin v. City of Struthers*, 319 U.S. 141 (1943). As applied to the instant case, foreclosing the right of Petitioner to testify in a criminal trial is not only a burden on her First Amendment right to testify, but is also a burden upon the judge, the jury, and the public's First Amendment right to hear what she has to say. In the instant case, the speaker is an expert witness in contact with the judicial system. If the Oklahoma Supreme Court opinion is

applied to the expressive activity of witness testimony, it clearly strikes at the center of the concerns of the First Amendment freedoms by prohibiting expert witness testimony merely because the Oklahoma Supreme Court disagrees with its content. In so doing, the Oklahoma Supreme Court would directly inhibit the public's right to receive this information from those under ordinary circumstances are most calculated to be intimately familiar with this aspect of the government process. That is, the entire judicial system — which includes the judge, the jury, the prosecutors, the defense attorneys, the criminal defendants, the witnesses, and the public — was entitled to hear the Petitioner's testimony uninhibited by the fear that she would lose her unemployment benefits if the content of her testimony displeased the Oklahoma Supreme Court. It can only be concluded that the First Amendment is clearly offended by such a restriction on the summoned testimony of an expert witness in a criminal trial. The Oklahoma Supreme Court's opinion denied unemployment benefits due to such testimony. Thus, utilization of unemployment benefits to penalize the speech here in question is a significant impairment of First Amendment rights.

The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern. "'[D]ebate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As applied to the instant case, Petitioner's expert testimony in the criminal trials, relied upon by the Oklahoma Supreme Court to deny her unemployment benefits, dealt with maters of public concern and enjoyed heightened protection under abundant Tenth Circuit precedent. *See Worrell*, 219 F.3d at 1209; *Lytle v. City of Haysville* , 138

F.3d 857, 867 (10th Cir. 1998); and *Melton*, 879 F.2d at 714. Therefore, pursuant to *Rankin*, the Oklahoma Supreme Court's alleged improper or inaccurate characterization of Petitioner's testimony is irrelevant. Because "[d]iscontent over the subject matter to which the protected speech relates, ... does not render that speech itself disruptive." *Dooley v. City of Philadelphia*, 153 F. Supp. 2d 628, 650 & n.22 (E.D. Pa 2001). In other words, the Oklahoma Supreme Court is **not** permitted to deny the Petitioner unemployment compensation merely because it disagrees with the **content** of her courtroom testimony. "This concern with limiting what subjects may be spoken to by which speakers is absolutely inimical to the principles of the First Amendment. In the realm of protecting speech, the government is constitutionally disqualified from dictating the subject about when persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. at 785. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (Internal citations omitted.) "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought free from government censorship." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). For the Oklahoma Supreme Court to deny Petitioner's unemployment benefits — because she expressed her opinion while testifying as an expert witness in a court of law — constitutes "government censorship" and violates this Nation's most sacred freedom as protected by the United States Constitution: the freedom of expression. Neither of the two cases cited by the Oklahoma Supreme Court reveal that the Petitioner made knowingly or recklessly false statements. In each case, Petitioner merely stated her opinion in response to questions directed at her. Specifically, the Oklahoma Supreme Court opinion states, "[c]learly, Gilchrist

did not satisfy that standard when she testified in *Mitchell* that the DNA evidence was 'inconclusive,' despite having been told by the FBI chemist that the DNA was *not* Mitchell's." *Gilchrist*, 94 P.3d 72, 2004 OK 47, ¶ 9. However, in *Mitchell*, the Petitioner gave her expert opinion in response to the question as follows:

> Q: (By Mr. Deason) Ms. Gilchrist do you know whether the FBI DNA analysis was able to associate any of this evidence to the Defendant in this case?
> A: No, they were not able to.
> Q: Would it be correct to say the results were inconclusive?
> A: Yes.

On cross examination, Petitioner testified:

> Q: You testified that this FBI report received from Michael Vick at the FBI DNA lab was inconclusive, right?
> A: In reference to your client, yes.

Mitchell, 150 F. Supp. 2d. at 1233. The Petitioner was **not** asked to explain the reason(s) for her expert opinion that the FBI report was inconclusive, by either the prosecution or the defense. Clearly, the Petitioner's expert opinion testimony was not knowingly or recklessly false. "If the First Amendment protects a public employee from ... what he has said, it must also protect him from ... what he believes." *Branti v. Finkel*, 445 U.S. 507, 515 (1980).

Under the First Amendment, there is no such thing as a

false idea. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Welch,* 418 U.S. 323, 340-341 (1974). Ironically, in the criminal trials in which Petitioner testified as an expert witness, her opinion testimony was authorized by, and not penalized by, those courts. However, those same ideas and opinions were penalized by the Oklahoma Supreme Court.

This Court has expressly held that "absent proof of false statements knowingly or recklessly made," the "right to speak on issues of public importance, may **not** furnish the basis for dismissal from public employment." *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (emphasis added). In *Branti*, this Court stated that a government employee:

> [C]annot be dismissed for engaging in constitutionally protected speech, the court had stated: For at least a quarter century, this court has made clear that even though a person has "no right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. **It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest — especially, his interest in freedom of speech.** For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such

> interference with constitutional rights is impermissible.

Branti, 445 U.S. at 514-515, *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958) (emphasis added). *See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990) (same quote). Clearly, the Oklahoma Supreme Court's opinion finding misconduct based on Petitioner engaging in constitutionally protected speech denied her the government benefit of unemployment compensation because of her constitutionally protected speech in the form of expert witness testimony.

Incredibly, and in open defiance of the above referenced First Amendment constitutional principles, the Oklahoma Supreme Court's opinion actually states:

> Gilchrist cites several opinions, which she claims support her contention that her constitutionally protected right to free speech was violated because she was fired as a result of her testimony in criminal prosecutions.[3] We have found nothing in the cases Gilchrist cites, though, which would convince us that her constitutional rights were violated here. In most of those cases persons who had been accused of crimes sued parties who had been witnesses for the prosecution for money damages on the ground that those defendants' testimony had deprived the convicted plaintiffs of their civil rights. Further, in none of those opinions was the testimony at issue judicially determined to have been false or misleading.
>
> Fn.3. In support of this proposition Gilchrist

> cites, among other opinions. *Williams v. Hepting*, 844 F.2d 138, 141 (3d Cir. 1988); *Worrell v. Henry*, 219 F.3d 1197, 1204 (10th Cir. 2000); and *Briscoe v. LaHue*, 460 U.S. 325, 330-331 (1983).

Gilchrist, 94 P.3d 72, 2004 OK 47, ¶ 12 & n. 3. Because the First Amendment protects the right to testify at trial, this statement, on its face, constitutes an error of law. To permit the Oklahoma Supreme Court to, in effect, substantially regulate an employee's witness testimony, would violate a fundamental principal of liberty and justice which lies at the base of our civil and political institutions. *Hebert v. Louisiana*, 272 U.S. 312 (1926). Furthermore, First Amendment speech in the from of testimony is constitutionally protected as a matter of law. *Copp*, 882 F.2d at 1550. This Court, interpreting the United States Constitution via the First Amendment, stated that it is clearly established that a State may not condition public employment on grounds that infringe on its employees' constitutionally protected right to freedom of expression. *Rankin*, 483 U.S. at 383; *Connick*, 461 U.S. at 142; and *Pickering*, 391 U.S. at 572-574.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The First Amendment Constitutional right to testify must be protected so as to ensure that testimony in court would be free, uninhibited, robust, and wide open, even if it includes testimony that judges disagree with, criticize, or believe to be inconsistent with the standards of the court. The criticisms of this testimony is not the test established by the United States Supreme Court in *Pickering*, 391 U.S. at 574, wherein this Court expressly held that "absent proof of false statements knowingly or recklessly made," the "right to speak on issues of

public importance, may not furnish the basis for" a denial of a public benefit.[1]

1. This is a case of first impression. Although this Court has held that the First Amendment protects First Amendment expression unless it is shown to be knowingly and recklessly false through *Pickering*, the principle has not been applied to First Amendment expression in the form of expert opinion testimony where the witness is not testifying to facts, but is rendering his or her expert opinion.

Although this Court has held that government officials who give testimony in court — even those who testify falsely — are immune from suit, through *Briscoe*, the principle has not been applied to government officials who give expert opinion testimony that is later criticized as being false; and whether the government entity can deprive the government employee who gave expert opinion testimony, of governmental benefits.

The First Amendment principles of both *Pickering* and *Briscoe* need to be updated and applied to expert opinion testimony so as to fashion a test to determine when opinion testimony is not protected by the First Amendment and when opinion testimony can be cited as a reason to deny the expert witness government benefits. This Court has repeatedly stated that a government official cannot be deprived of a government

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[1] As stated *supra*, there are plenty of judicial safeguards already built into the system that are available to sanction inappropriate and false testimony, up to, and including perjury. When warranted, these safeguards should be implemented, rather than retaliating against testimony merely because the court is displeased with or disagrees with the content of the expert's opinion testimony.

benefit for exercising rights protected by the First Amendment. *Connick*, and *Rankin*. However, this doctrine has **not** been applied specifically to the exercise of First Amendment rights for expert opinion testimony. Furthermore, this Court has not applied the principles of *Pickering* to either courtroom testimony or expert opinion testimony.

Federal Circuit courts have held that only truthful testimony enjoys First Amendment protection, but what constitutes truthful testimony especially regarding expert opinion testimony has not been delineated. *Worrell*, *supra*, *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996), and *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982). In light of the above precedent, the Oklahoma Supreme Court opinion in this case appears contrary to this Court's First Amendment jurisprudence.

2. Even if expert witness testimony is knowingly false, it enjoys immunity from the denial of State public benefits, similar to the immunity enjoyed when applied to public officials as applied in *Briscoe*, 460 U.S. at 330-331.

A. The immunity witnesses enjoy should be expressly extended to expert witness testimony. This Court should develop a test to determine under what circumstances expert witness testimony enjoys First Amendment immunity.

3. The Oklahoma Supreme Court decision in this case is incorrect.

A. The Oklahoma Supreme Court fails to recognize the First Amendment right to testify and express one's beliefs in the form of expert opinion testimony without being deprived of a government benefit for doing so.

B. The Oklahoma Supreme Court fails to apply the *Pickering* test to the expert witness testimony of the Petitioner. Instead, the Oklahoma Supreme Court states that it was "judicial determination" that Petitioner's testimony was false. If one applies the *Pickering* test to Petitioner's expert opinion testimony in *Mitchell* and *McCarty*, then it is apparent that her expert opinions were not knowingly or recklessly false.

C. This Court's guidance is needed to apply a *Pickering*-type test to expert opinion testimony.

CONCLUSION

For the above and foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 2004

Certificate of Delivery

This is to certify that on the 13th day of September, 2004, a true and correct copy of the foregoing Petition for Writ of Certiorari has been delivered, either by hand delivery, or by First Class, United States mail, with postage prepaid thereon, to:

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//s// Melvin C. Hall
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Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

JOYCE A. GILCHRIST, Petitioner,

v.

BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

APPENDIX

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GILCHRIST v. BOARD OF REVIEW OF THE OKLA. EMPLOYMENT SECURITY COMMISSION
2004 OK 47
94 P.3d 72
Case Number: 98495
Decided: 06/15/2004

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2004 OK 47, 94 P.3d 72

JOYCE A. GILCHRIST, Plaintiff-Appellant,
v.
BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY, Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY,
OKLAHOMA, HONORABLE VICKI L. ROBERTSON, TRIAL JUDGE

¶0 On October 29, 2002, the District Court of Oklahoma County, Hon. Vicki L. Robertson, trial judge, entered judgment against plaintiff, Joyce L. Gilchrist, and in favor of defendants, Board of Review of the Oklahoma Employment Securities Commission, the Oklahoma Employment Securities Commission, and the City of Oklahoma City. The trial court's judgment affirmed the opinion of the Board of Review, dated February 15, 2002, which affirmed a hearing officer's order, dated February 4, 2002. The February 4, 2002 order had

affirmed the determination by the Oklahoma Employment Securities Commission, dated October 12, 2001, that Gilchrist was not entitled to unemployment benefits following her discharge for cause as a forensic chemist for the City of Oklahoma City. Gilchrist appealed and on September 30, 2003, we entered an order retaining this appeal for decision by this Court.

JUDGMENT OF THE TRIAL COURT AFFIRMED

Melvin C. Hall, RIGGS, ABNEY, NEAL, TURPIN, ORBISON & LEWIS, Oklahoma City, Oklahoma, for Plaintiff-Appellant, Richard Smith, Assistant Municipal Counselor, Oklahoma City, Oklahoma, for Defendant-Appellee, City of Oklahoma City, Teresa Thomas Keller, Oklahoma City, Oklahoma, for Defendant-Appellee, Oklahoma Employment Securities Commission.

WATT, C.J.,

FACTS AND PROCEDURAL BACKGROUND

¶1 Appellant, Joyce Gilchrist, worked for the City of Oklahoma City Police Department as a forensic chemist for many years. Gilchrist was responsible for collecting and analyzing evidence from crime scenes and testifying as to the results in criminal prosecutions. Gilchrist was fired in 2001, in part based on United States District Judge Ralph Thompson's published opinion in a habeas corpus proceeding, Mitchell v. Ward, 150 F.Supp 2d 1194 (W.D.Okla. 1999). The issues before Judge Thompson arose from a criminal matter tried in the District Court of Oklahoma County in which Gilchrist had testified for the prosecution. Based on his analysis of the evidence developed in the habeas corpus matter, Judge Thompson concluded that Gilchrist's testimony in the criminal trial

concerning DNA evidence had been, "without question untrue," 150 F.Supp.2d at 1226, and "terribly misleading, if not false," 150 F.Supp.2d at 1229.

¶2 Judge Thompson's opinion in Mitchell reveals that the petitioner, Mitchell, had been tried and convicted of forcible rape and murder. Mitchell's habeas corpus proceeding was based on his claim that he had been denied access to exculpatory evidence. As a result of the seriousness of Mitchell's claims, Judge Thompson allowed Mitchell to conduct discovery, which produced Gilchrist's notes regarding her conversations with an FBI chemist regarding the DNA testing by the FBI.

¶3 Judge Thompson then granted Mitchell an evidentiary hearing. Gilchrist had testified at the criminal trial that the FBI's DNA analysis was "inconclusive" as to whether any DNA sample may have matched Mitchell's DNA. But the FBI chemist testified in the federal habeas corpus hearing that Mitchell's DNA was not found in the FBI testing and that was the import of his report to Gilchrist. Gilchrist admitted in the federal court hearing that the DNA evidence did, indeed, exclude Mitchell. It was as a result of these revelations that Judge Thompson concluded that Gilchrist's trial testimony, to the effect that the DNA results were "inconclusive," was untrue. On appeal from Judge Thompson's ruling the United States Court of Appeals for the 10th Circuit summarized the effect of Gilchrist's testimony: "Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense." [Emphasis by the court.] Mitchell v. Gibson, 262 F.3d 1036, 1064 (10th Cir. 2001).

¶4 Immediately after Oklahoma City police department officials received a copy of Judge Thompson's opinion in Mitchell in the

Fall of 1999, they began an investigation into Gilchrist's conduct. Although Gilchrist complains that excessive time elapsed from the time of her testimony against Mitchell in 1992 and the hearing, the record reflects that it was Judge Thompson's 1999 opinion that brought to light the seriousness of Gilchrist's misconduct and the police department investigation started immediately thereafter. Following its investigation the police department started disciplinary proceedings before the Police Department Review Board. These proceedings were significantly delayed as a result of Gilchrist's having sought continuances and having filed a federal court lawsuit to prohibit the city from conducting the hearing. Finally, the Police Department Review Board, after fourteen days of hearings and deliberations ending September 12, 2001, terminated Gilchrist's employment on September 25, 2001.

¶5 Gilchrist filed a claim with the Oklahoma Employment Securities Commission seeking unemployment benefits; On October 15, 2001 the Oklahoma Employment Securities Commission denied Gilchrist's claim based on the Commission's conclusion that Gilchrist had been fired for misconduct. On October 25, 2001, Gilchrist appealed to an Appeal Tribunal of the Oklahoma Employment Securities Commission. On December 12, 2001 a hearing was held before an Appeal Tribunal hearing officer, who affirmed the Commission's determination on February 4, 2002. Gilchrist appealed from the Appeal Tribunal's order and on April 26, 2002 the Oklahoma Employment Securities Commission Board of Review affirmed. Gilchrist filed her petition for judicial review in the District Court of Oklahoma County on May 7,2002. The trial court affirmed the opinion of the Board of Review on October 29, 2002 and this appeal ensued.

STANDARD OF REVIEW

¶6 Title 40 O.S. 2001 § 2-610 provides, ". . . In any proceeding under this section the findings of the Board of Review as to the facts, if supported by evidence, shall be conclusive and the jurisdiction of said court shall be confined to questions of law. . . ." This Court's standard of review on appeal is the same as that of the trial court. Further, the question of what constitutes "misconduct" sufficient to deprive a terminated employee of entitlement to unemployment benefits is a question of law. Nordam v. Oklahoma Employment Securities Commission, 1996 OK 110. ¶ 12, 925 P.2d 556, 559.

DISCUSSION

¶7 Title 40 O.S. 2001 § 2-406 provides that an individual shall be disqualified from receiving unemployment benefits if the employee was discharged for "misconduct."1 We have defined "misconduct," as that word is used in § 2-406, to be:

. . . conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

[Emphasis added.] Vester v. Board of Review of Oklahoma Employment Securities Commission, 1985 OK 21, ¶ 15, 697 P.2d 533, 538.

¶8 In addition to Judge Thompson's and the 10th Circuit's Mitchell opinions, the record in the trial court contains the Court of Criminal Appeals's opinion in McCarty v. State, 1988 OK CR 271, 765 P.2d 1215, which similarly found fault with Gilchrist's conduct. The record also contains other opinions that criticized Gilchrist's conduct in other criminal prosecutions.2

¶9 We hold that Gilchrist's conduct in Mitchell, that is knowingly giving false and misleading testimony in a criminal case, constituted "misconduct" sufficient to support the denial of unemployment benefits under § 2-406, as defined in Vester, 1985 OK 21, ¶ 15, 697 P.2d 533, 538. Nothing could be more fundamental than the obligation of a forensic chemist employed by a police department to give testimony that is both honest and fair. Only in this way can our criminal justice system itself be regarded as both honest and fair. Clearly, Gilchrist did not satisfy that standard when she testified in Mitchell that the DNA evidence was "inconclusive," despite having been told by the FBI chemist that the DNA was not Mitchell's."

¶10 The McCarty opinion also reveals "misconduct," as found by the Appeal Tribunal, the Board of Review, and affirmed by the trial court. Gilchrist had testified in a murder trial that forensic techniques were not sufficiently advanced to allow positive identification of a person through blood typing, secretor status, or hair analysis. The Court of Criminal Appeals, though, held, "We find it inconceivable why Ms. Gilchrist would give such an improper opinion, which she admitted she was not qualified to give." McCarty, 1988 OK CR 271at ¶ 6. [Emphasis added.] The court went on to observe, "Whether or not Ms. Gilchrist's opinion constituted an improper personal expression of the appellant's guilt, her opinion that appellant was in fact present when violence was done to the victim was an improper expert opinion, because it was beyond the present state of the art of forensic science, and certainly beyond

Gilchrist's personal knowledge, as testified to by both Ms. Gilchrist and Mr. Wilson." McCarty, 1988 OK CR 271at ¶ 8. [Emphasis added.] As noted, such testimony brings into question the honesty and fairness of the criminal justice system.

¶11 We hold that Gilchrist's derelictions "show[ed] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to [her] employer." Vester, 1985 OK 21, at ¶ 15. Her conduct, therefore, was "misconduct," as that word is used in 40 O.S. 2001 § 2-406.

Gilchrist had no constitutionally protected right to free speech sufficient to protect her from the consequences of her testimony in the Mitchell or McCarty prosecutions.

¶12 Gilchrist cites several opinions, which she claims support her contention that her constitutionally protected right to free speech was violated because she was fired as a result of her testimony in criminal prosecutions.3 We have found nothing in the cases Gilchrist cites, though, which would convince us that her constitutional rights were violated here. In most of those cases persons who had been accused of crimes sued parties who had been witnesses for the prosecution for money damages on the ground that those defendants' testimony had deprived the convicted plaintiffs of their civil rights. Further, in none of those opinions was the testimony at issue judicially determined to have been false or misleading.

¶13 In stark contrast to any of the cases Gilchrist cites, the record of the testimony in the cases at issue here was carefully considered in post-trial proceedings by courts not involvedn the trials themselves. Those courts found that Gilchrist's testimony was either false and misleading or wilfully improper in other ways. On this record, we hold that Gilchrist's rights to free speech were not violated.

CONCLUSION

¶14 The record supports the unanimous holding of the Oklahoma Employment Securities Commission, the Appeal Tribunal, the Board of Review, and the trial court that Gilchrist was guilty of "misconduct" in Gilchrist's job performance, as that word is used in 40 O.S. § 2-406 and was interpreted in Vester v. Board of Review of Oklahoma Employment Securities Commission, 1985 OK 21, ¶ 15, 697 P.2d 533, 538. Gilchrist's testimony in the criminal prosecutions described in Mitchell v. Ward, 150 F.Supp.2d 1194 (W.D.Okla. 1999); Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001); and McCarty v. State, 1988 OK CR 271, 765 P.2d 1215, amply supports the holding. By testifying as she did in those cases, Gilchrist violated her fundamental obligation as a forensic chemist for the Oklahoma City Police Department to give testimony that was both honest and fair. Gilchrist's derelictions "show[ed] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to [her] employer." Vester, 1985 OK 21, at ¶ 15. Her conduct, therefore, was "misconduct," as that word is used in 40 O.S. 2001 § 2-406. Our holding serves to protect the integrity of the criminal justice system by demonstrating that giving false or unfair testimony in criminal prosecutions has consequences.

¶15 Gilchrist's civil right to free speech did not serve to insulate her from the consequences of her testimony in the criminal prosecutions at issue here. Her testimony was judicially determined to have been either false and misleading or improper in other ways. Thus, the opinions cited by Gilchrist, see note 3, are inapposite because in none of them had the defendant's testimony been judicially determined to have been false, misleading, or improper in some other way.

JUDGMENT OF THE TRIAL COURT AFFIRMED

ALL JUSTICES CONCUR.

FOOTNOTES

1 Title 40 O.S. 2001 § 2-406 provides:

An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission. Disqualification under this section shall continue for the full period of unemployment next ensuing after he has been discharged for misconduct connected with his work and until such individual has become reemployed and has earned wages equal to or in excess of ten (10) times his weekly benefit amount

2 Those opinions are: McCarty v. State, 1995 OK CR 48, 904 P.2d 110; Cannon v. Gibson, 259 F.3d 1253 (10th Cir. 2001); Pierce v. State, 1990 OK CR 7, 786 P.2d 1255; Ables v. State, OK CR F-1986-776 (unpublished); and Fox v. State, 1989 OK CR 51, 779 P.2d 562.

3 In support of this proposition Gilchrist cites, among other opinions. Williams v. Hepting, 844 F.2d 138,141 (3d Cir. 1988); Worrell v. Henry, 219 F.3d 1197, 1204 (10th Cir. 2000); and Briscoe v. LaHue, 460 U.S. 325, 330-331 (1983).

OPALA, V.C.J., concurring.

¶1 The court affirms the denial of unemployment benefits to plaintiff Gilchrist on the grounds that (a) her conduct as a forensic chemist in several criminal prosecutions1 constitutes a §2-4062 "misconduct" as that term has been construed by extant jurisprudence3 and (b) her First Amendment right to

speak freely does not insulate her from the adverse consequences of her testimonial misconduct.

¶2 I concur in today's decision and in the court's pronouncement. I write separately (a) to explain why Gilchrist cannot interpose here her immunity from civil liability as a criminal prosecution witness to prevent the imposition of adverse collateral consequences of her testimonial conduct upon her claim to unemployment benefits and (b) to focus on her argument that judicial denial of governmental benefits was predicated upon a constitutionally impermissible condition.

I

PLAINTIFF APPEARS TO ARGUE THAT HER COMMON-LAW IMMUNITY AS A WITNESS PROTECTS HER FROM GOVERNMENT USE OF HER TESTIMONY TO SHOW MISCONDUCT

¶3 Gilchrist appears to rely on and invoke the common-law rule that shields witnesses from civil liability for any harm occasioned by testimony given in court proceedings. She claims there is no record support for the judicial analyses in certain state and federal criminal cases4 to show her testimony to have been improper, inaccurate or misleading. According to Gilchrist, the denial of unemployment benefits rests on a mere disagreement with the content of her testimony.

¶4 Assuming Gilchrist is not guilty of perjury and taking due notice of her protection as a witness, the immunity she invokes extends no farther than to shield her from civil liability for harm occasioned by the testimony. It cannot be stretched to cover all collateral public-law consequences5 that adversely affect her claim to governmental benefits.

The Outer Limit of Witness Immunity

¶5 At common law witnesses were immune from suits to recover damages for harm occasioned by testimony given in judicial proceedings.6 Federal constitutional jurisprudence has extended witness immunity to civil suits brought under 42 U.S.C. §1983.7 Oklahoma has long recognized that lawyers, parties and witnesses are immune from defamation and certain other claims rested upon communications made during, or preliminary to, judicial proceedings as long as the communication is in some way relevant to the proceeding.8 Recent Oklahoma jurisprudence has extended the witness immunity shield to protect against tort actions for damages occasioned by one's perjury (but not to criminal prosecutions for perjury).9

¶6 Adverse collateral public-law consequences of a witness' testimony, such as those flowing from a criminal prosecution for perjury, professional discipline, and from other forms of censure and sanction, fall outside the ambit of witness immunity. That immunity will not protect an attorney from professional discipline based on unethical conduct resulting in defamation.10 A number of states and the federal government have imposed professional discipline on lawyers for perjury and other litigation-related misconduct, holding that these consequences, though immunized from civil liability, nonetheless lie dehors the witness immunity shield.11 Others have indicated (in dicta) that an attorney remains subject to professional discipline for litigation-related misconduct even where redress by civil action is unavailable because of witness immunity.12

The Adverse Consequence of Gilchrist's Breach of Public-Employment
Duty To Maintain Scientific Integrity In Her Work Performance

¶7 While employed as a police department's forensic chemist, Gilchrist had a duty to maintain scientific integrity in her work. Obedience to this level of performance is exacted by the public-law standards that govern constitutional strictures for guilt determination in criminal prosecutions. That duty's breach is now advanced as misconduct (in the §2-406 sense) to defeat her claim for unemployment compensation. Gilchrist's witness immunity13 will not protect her against this adverse consequence of public employment. Shielded by that immunity is solely civil liability in damages for harm occasioned by one's testimonial falsehood.

¶8 In short, the denial of unemployment benefits is a sanctioned adverse collateral public-law consequence of Gilchrist's testimonial improprieties.14

II

GILCHRIST APPEARS TO ARGUE THAT THE GOVERNMENT'S
USE OF HER TESTIMONY TO SHOW "MISCONDUCT" (IN THE
§2-406 SENSE) OFFENDS THE FIRST AMENDMENT'S FREE-
SPEECH CLAUSE PROTECTION AGAINST HAVING HER CLAIM
TO UNEMPLOYMENT BENEFITS BURDENED BY AN
UNCONSTITUTIONAL CONDITION

¶9 Gilchrist claims that the denial of unemployment benefits based on mere judicial disagreement with the content of her testimony as an expert witness in criminal cases infringes upon her First Amendment right to speak freely. Relying on Worrell v. Henry15 and other federal circuit jurisprudence,16 she argues that the denial of benefits cannot be rested on a constitutionally

impermissible condition - one that places a penalty on her exercise of free-speech guarantee.17 She reasons and urges that the denial of unemployment benefits based on her testimony as an expert witness constitutes government censorship and violates her protected freedom of expression on matters of public concern.

¶10 The First Amendment is not implicated here. The government's scrutiny of her testimony for its lack of support in elicited scientific data does not offend the First Amendment's Free Speech Clause. Much like commercial speech,18 testimony must always conform to the reality of established facts. Neither does the use of judicial analyses of Gilchrist's testimonial impropriety (in the discharge of her employment duties) offend constitutional protection of her utterance from government retaliation. Disapproval here comes from her testimony's failure to meet the minimum standards of scientific integrity. The government did not tender these analyses for any purpose other than to show her substandard professional performance as a forensic analyst. No constitutional barrier, federal or state, has been identified to prohibit the use of judicial analyses of a public employee's expert testimony as proof of unacceptable job performance. Moreover, government's demonstration of legitimate problems adversely affecting an employee's discharge of public employment duties cannot be mistaken for a constitutionally impermissible retaliatory response. No one would dare deny that the government has a compelling interest in maintaining acceptable job performance standards for its personnel.

¶11 Conditioning a public employee's claim to a governmental benefit on conformity to the norms of scientific integrity in carrying out her day-to-day work duties does not place a constitutionally prohibited burden on its benefit. In sum, the claim-burdening condition of which Gilchrist complains is

clearly authorized - nay, mandated - by this Nation's highest norms of federal law - its regime of constitutional strictures that govern the process of guilt determination in criminal prosecutions.

FOOTNOTES

1 For the criminal cases in controversy, see infra note 14.

2 The pertinent terms of 40 O.S.2001 § 2-406 provide:

An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission. . . . .
(emphasis added).

3 Vester v. Board of Review of Oklahoma Employment Security Commission, 1985 OK 21, ¶15, 697 P.2d 533, 538.

4 For the criminal cases in controversy, see infra note 14.

5 Adverse public-law consequences are all those which constitute the collateral effect of judgments or convictions. For example, nondischargeability in bankruptcy is a collateral adverse consequence of a civil judgment based on fraud and deceit or of a judgment for child support. There are many adverse collateral consequences of a felony conviction, such as the loss of right to vote, eligibility for citizenship, national security clearance, as well as licensing and employment-related restrictions, disqualification from military service or from holding public office. The loss of a driver's license is another collateral consequence of some criminal convictions. See in this connection Margaret Colgate Love, Starting Over With A Clean Slate: In Praise Of A Forgotten Section Of The Model Penal Code, 2003 Fordham Urban Law Journal 1705.

6 The immunity of parties and witnesses from liability in damages for giving harmful testimony in judicial proceedings was established early in the English common law. See Briscoe v. LaHue, 460 U.S. 325, 330-31, 103 S.Ct. 1108, 1113, 75 L.Ed.2d 96 (1983), in which the Court cites Cutler v. Dixon, 76 Eng. Rep. 886 (K.B.1585) and Anfield v. Feverhill, 80 Eng. Rep. 1113 (K.B.1614) as early English authority for the immunity doctrine.

7 Briscoe, supra note 6, 460 U.S. at 345-46, 103 S.Ct. at 1121.

8 Hammett v. Hunter, 1941 OK 253, ¶0, 117 P.2d 511, 511 syl.1 ("1. Defamatory words published by the parties, counsel or witnesses, in due course of a judicial proceeding and which are connected with, or relevant or material to, the cause in hand or subject of inquiry, constitute an absolutely privileged communication, and no action will lie therefor, however false or malicious they may in fact be."); Kirschstein v. Haynes, 1990 OK 8, 788 P.2d 941 (the immunity doctrine (a) applies not only to defamation suits, but also to suits for intentional infliction of emotional distress arising from the same circumstances as the defamation claim, and (b) encompasses communications made preliminary to judicial or quasi-judicial proceedings). See also Pacific Employers Ins. Co. v. Adams, 1946 OK 86, 168 P.2d 105 (statements made in a physician's report attached to pleading filed in the State Industrial Court are immune); Hughes v. Bizzell, 1941 OK 277, 117 P.2d 763 (statements made at a hearing before the University Board of Regents to determine if discharge of employee should be upheld are immune); Sanford v. Howard, 1939 OK 343, 95 P.2d 644 (statements made during a session of the University Board of Regents concerning an employee's alleged immoral conduct are immune); Dickerson v. Crozier, 1927 OK 401, 261 P. 545 (statements made in a complaint in the city police court are immune).

9 Cooper v. Parker-Hughey, 1995 OK 35, 894 P.2d 1096, 1098. There the court identified the following public-policy reasons for rejecting perjury as a tort: (1) absolute immunity for witnesses in a judicial proceeding encourages witnesses to speak freely without fear of civil liability; (2) perjury is a public offense and regulated solely by criminal law; (3) the need for finality in judgments, (4) the possibility of a multiplicity of suits by parties dissatisfied with the outcome of trials, and (5) lack of precedent for such actions. Id. at ¶27, at 1101. The court relied heavily on the reasoning expressed in Briscoe, supra note 6, a 1983 United States Supreme Court decision in which convicted defendants brought a civil rights action against police officers who testified against them, alleging that the officers violated the defendants' constitutional rights to due process and a fair trial by falsely testifying that the criminal defendants had been able to harmonize their stories, thereby rendering the exculpatory statements of each criminal defendant less credible. Id. at 332-33, 103 S. Ct. at 1114-15.

10 Kirschstein, supra note 8, at ¶19, at 951; see also Selby v. Burgess, 712 S.W.2d 898, 900 (Ark.1986) (the privilege does not immunize an attorney from liability for professional discipline).

11 See, e.g,. Imbler v. Pachtman, 424 U.S. 409, 428-29, 96 S. Ct. 984, 994, 47 L. Ed.2d 128 (1976) (prosecutorial immunity from liability in civil suits brought under 42 U.S.C. §1983 does not leave the public without recourse to censure prosecutorial misconduct because prosecutors remain subject to professional discipline). See also Attorney Grievance Commission v. White, 731 A.2d 447 (Md. 1999); Barreiro v. State Bar, 471 P.2d 992 (Calif. 1970); Montag v. State Bar, 652 P.2d 1370 (Calif. 1982); Montgomery County Bar Association v. Hecht, 317 A.2d 597 (Pa. 1974); United States v. Modica, 663 F.2d 1173, 1185 (2d Cir. 1981) (the court observed that "the message of a single

thirty-day suspension from practice would be far clearer than the disapproving remarks in a score of appellate opinions"); McGuire v. State, 677 P.2d 1060 (Nev. 1984) (a prosecutor is fined $500 for "extreme and outrageous" misconduct); United States v. Ranger Elec. Communications, Inc., 22 F. Supp.2d 667 (W.D. Mich. 1998); Matter of Barratt, 663 N.E.2d 536 (Ind. 1996); see also Carissa Hessick, Prosecutorial subornation of perjury: Is the fair justice agency the solution we have been looking for?, 2002 South Dakota L.Rev. 255.

12 See Stucchio v. Tincher, 726 So.2d 372, 374 (Fla. App. 1999) ("[r]emedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state"); Selby v. Burgess, 712 S.W.2d 898, 900 (Ark 1986) (while the privilege protects an attorney from litigation it will not make him immune from professional discipline); Theiss v. Scherer, 396 F.2d 646, 649 (6th Cir. 1968); Ruberton v. Gabage, 654 A.2d 1002, 1007 (N. J Super Ct. App. Div. 1995) (the absolute privilege applies only to claims of tortious conduct and not to a claim of unprofessional conduct or to summary contempt proceedings against the offending lawyer).

13 There are various types of immunities - testimonial immunity, immunity from suit (legislative, executive, judicial, or diplomatic), immunity from civil liability, immunity from prosecution, as well as use immunity. Use immunity prohibits the use of compelled testimony or any evidence derived from that testimony against the witness in a criminal prosecution. If evidence is compelled under a grant of immunity and there is a later prosecution, the government has the burden of demonstrating that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Kastigar v. United States, 406 U.S. 441, 452-53, 92 S.Ct. 1653, 1653, 32 L.Ed.2d 212 (1972) (to preserve the

witness' privilege against self-incrimination, the prosecution is precluded from using against the defendant any responsive testimony elicited from him or any evidence derived therefrom).

14 The Oklahoma Security Commission relied for proof of Gilchrist's misconduct on the judicial analyses of her testimony in Mitchell v. Ward, 150 F.Supp.2d 1194 (W.D.Okl. 1999); Mitchell v. Gibson, 262 F.3d 1036 (10th Cir.2001); McCarty v. State, 1995 OK CR 48, 904 P.2d 110; Cannon v. Gibson, 259 F.3d 1253 (10th Cir. 2001); Pierce v. State, 1990 OK CR 7, 786 P.2d 1255; Ables v. State, OK CR F-1986-776 (unpublished); Fox v. State, 1989 OK CR 51, 779 P.2d 562; McCarty v. State, 1988 OK CR 271, 765 P.2d 1215.

15 219 F.3d 1197, 1209 (10th Cir.2000). In Worrell the court held that a prosecutor's office did not offend the First Amendment when it rescinded an offer to hire an individual to be a drug task force coordinator because he had testified as an expert defense witness in a murder trial. A district attorney's interest in maintaining an efficient drug task force outweighed the applicant's interest in avoiding retaliation for his testimony as an expert witness against a police officer. Announcing a three-part standard for evaluating First Amendment retaliation claims, the court stated that a plaintiff must prove (1) that the plaintiff "was engaged in constitutionally protected activity"; (2) that the defendant's actions caused the plaintiff "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) that the "defendant's adverse action was substa tially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." Id., at 1212.

16 Lytle v. City of Haysville, 138 F.3d 857, 867 (10th Cir. 1988); Melton v. City of Oklahoma City, 879 F.2d 706, 714 (10 th Cir. 1989).

17 Gilchrist claims that Melton, supra note 16, and Worrell, supra note 15, are applications of the doctrine against placing constitutionally impermissible conditions on one's right. For this doctrine, she quotes Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996). The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." Id., quoting Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

18 "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." Matter of R.M.J., 455 U.S. 191, 102 S.Ct. 929, 937-38, 71 L.Ed.2d 64 (1982). False, deceptive or misleading advertising is subject to governmental restraint. Bates v. State Bar of Arizona, 433 U.S. 350, 383-384, 97 S.Ct. 2691, 2708-2709, 53 L.Ed.2d 810 (1977).

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JOYCE A. GILCHRIST,

Petitioner,

v.

BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR THE RESPONDENT OKLAHOMA EMPLOYMENT SECURITY COMMISSION

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QUESTION PRESENTED

Whether it is a violation of Gilchrist's First Amendment rights for the state of Oklahoma to deny her claim for unemployment benefits after she was discharged for misconduct connected to her work, including knowingly giving false and/or misleading testimony as an expert witness for the prosecution in criminal trials?

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma, (Pet. App. 1-19), is published at 94 P.3d 72, 2004 OK 47.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on June 15, 2004. The Petition for a Writ of Certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATEMENT

Gilchrist was employed by the City of Oklahoma City as a forensic chemist supervisor from May 1980 to September 25, 2001. An investigation into Gilchrist's conduct, including her testimony in criminal prosecutions, was initiated by Oklahoma City police department officials upon receipt of Judge Thompson's opinion in *Mitchell v. Ward*, 150 F.Supp. 2d 1194 (W.D. Okla. 1999). Therein, Judge Thompson determined that Gilchrist's testimony about DNA evidence had been, "without question untrue," and "terribly misleading, if not false," *Id.* at 1226, 1229. Following an exhaustive, fourteen day investigation into allegations against Gilchrist of giving false and/or misleading testimony, laboratory mismanagement, flawed casework analysis and violating a court order, Gilchrist was terminated.

Gilchrist subsequently filed a claim for unemployment benefits with the Oklahoma Employment Security Commission. ("Commission"). The Commission, in a Determination

mailed October 15, 2001, found that Gilchrist was discharged from her employment for mishandling evidence, giving misleading testimony in court and failing to follow established policies and procedures. Further, it was noted in the Determination that "her actions caused innocent citizens unjust punishment." Gilchrist's claim for unemployment benefits was denied on the grounds of willful and/or intentional misconduct connected with the work, pursuant to 40 O.S. §2-406.

Gilchrist filed an appeal of the Commission's Determination to the Appeal Tribunal. In its Order of Decision, mailed February 5, 2002, the Appeal Tribunal affirmed the Commission's Determination denying Gilchrist's claim for unemployment benefits.

Gilchrist appealed the Order of Decision to the Board of Review. In an Opinion issued April 26, 2002, the Board of Review affirmed the denial of unemployment benefits.

Gilchrist appealed the Opinion to the District Court of Oklahoma County. In a Journal Entry of Judgment issued November 1, 2002, the District Court affirmed the Opinion of the Board of Review, again denying benefits. Gilchrist appealed the Journal Entry of Judgment to the Oklahoma Supreme Court on November 13, 2002. On June 15, 2004, the Oklahoma Supreme Court issued an opinion affirming the judgment of the District Court of Oklahoma County. It is from this decision that the instant appeal arises.

REASONS FOR DENYING THE WRIT

Gilchrist has shown no compelling reason for this Court to grant her Petition for Writ of Certiorari. In this

Court and below, Gilchrist has attempted to transform the actual question at issue into one of constitutional concern. As the Oklahoma Supreme Court correctly held, however, no constitutional issue is implicated in this case. The sole issue of whether Gilchrist's conduct on the job amounted to "misconduct" sufficient to warrant a denial of her unemployment benefits claim raises no concerns justifying review by this Court.

Gilchrist urges that denial of her claim for unemployment benefits violated her First Amendment rights, because she was fired, in part, for testifying as an expert witness on behalf of the state. However, her testimony has been judicially determined to be false and/or misleading in more than one instance. Gilchrist is asking this Honorable Court to extend First Amendment protection to her false and/or misleading testimony, presented on behalf of the prosecution in criminal trials.

I. THE OKLAHOMA SUPREME COURT'S DECISION DENYING GILCHRIST'S CLAIM FOR UNEMPLOYMENT BENEFITS WAS APPROPRIATE AND DOES NOT WARRANT REVIEW BY THIS COURT.

Gilchrist was denied unemployment benefits throughout the three-stage administrative process and again at the district court level. The basis for the denial was that since Gilchrist was terminated for misconduct connected to the work, she was not entitled to collect unemployment benefits pursuant to 40 O.S. §2-406. This statute states, in pertinent part, that, "An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission."

Misconduct was defined by the Oklahoma Supreme Court in *Vester v. Board of Review of the Oklahoma Employment Security Commission*, 1985 OK 21, ¶ 15, 697 P.2d 533, 537 (Okla. 1985), *citing Boynton Cab Company v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640 (1941) as follows:

> [c]onduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The Oklahoma Supreme Court held that Gilchrist's conduct in *Mitchell* of knowingly giving false and misleading testimony in a criminal case, constituted misconduct sufficient to support the denial of unemployment benefits. The Court stated:

> Nothing could be more fundamental than the obligation of a forensic chemist employed by a police department to give testimony that is both honest and fair. . . . Clearly, Gilchrist did not satisfy that standard when she testified in Mitchell that the DNA evidence was 'inconclusive,' despite

> having been told by the FBI chemist that the DNA was not Mitchell's.

(Pet. App. 6).

Additional evidence of misconduct was found by the Oklahoma Supreme Court in the opinion of the Court of Criminal Appeals of Oklahoma in *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, (Okla. Crim. App. 1988). In McCarty's murder trial, Gilchrist testified that forensic techniques were not advanced enough to allow positive identification of an individual through blood typing, secretor status or hair analysis. The Court of Criminal Appeals held:

> We find it inconceivable why Ms. Gilchrist would give such an improper opinion, which she admitted she was not qualified to give.

Id. at 271, ¶ 6, 765 P.2d at 1218.

Further, the court stated:

> Whether or not Ms. Gilchrist's opinion constituted an improper personal expression of the appellant's guilt, her opinion that appellant was in fact present when violence was done to the victim was an improper expert opinion, because it was beyond the present state of the art of forensic science, and certainly beyond Gilchrist's personal knowledge, as testified to by both Ms. Gilchrist and Mr. Wilson.

McCarty, 1988 OK CR at 271, ¶ 8, 765 P.2d at 1218, 1219.

Upon a review of the evidence before it, the Oklahoma Supreme Court properly concluded that Gilchrist was terminated for misconduct, and that consequently, she did

not qualify for unemployment benefits under Oklahoma law.

II. THE FIRST AMENDMENT IS NOT IMPLICATED IN THE CASE AT BAR AS GILCHRIST'S FALSE AND MISLEADING TESTIMONY IN CRIMINAL TRIALS IS NOT PROTECTED BY THE FIRST AMENDMENT; THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Although it was judicially determined to be false and/or misleading, Gilchrist urges that her testimony in *Mitchell* and *McCarty* is constitutionally protected speech. In a revealing and conspicuous omission, even Gilchrist seems to acknowledge that her testimony was false and/or misleading; because she fails to assert that her testimony was truthful. In fact, she advances the argument that:

> "Even if expert witness testimony is knowingly false, it enjoys immunity from the denial of state public benefits, similar to the immunity enjoyed when applied to public officials as applied in *Briscoe*, 460 U.S. at 330-331."

(Pet. at 17).

Gilchrist repeatedly cites *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), in support of her assertion that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech. In *Pickering*, this Court stated,

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his

> right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574, 88 S. Ct. at 1738.

The flaw in the application by Gilchrist of *Pickering* to her facts is that her testimony was judicially determined to be false and/or misleading. In footnote 6 of the *Pickering* opinion, the Court noted that:

> Because we conclude that the appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.

In essence, Gilchrist is asking this honorable Court to consider whether testimony in a criminal trial, that was knowingly and recklessly false and that was shown to have such harmful effects as to shock the conscience, is protected by the First Amendment. The above referenced language in *Pickering* seems to suggest that this is not a question this Court would consider.

Also repeatedly cited by Gilchrist in her petition is *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000). Gilchrist quotes the following statements from *Worrell* in her brief:

> In order to encourage truthful and uninhibited testimony, the law has long afforded certain protections to witnesses. . . . In the last few decades, federal courts have afforded additional protection to witnesses who are employed by the government, concluding that truthful testimony

> is protected by the First Amendment and that a government employee may not be fired or subjected to other adverse action as a result of such testimony.

Worrell at 1204-1205.

Decisions such as *Worrell* do not support Gilchrist's position. Rather, they support this Respondent's argument that Gilchrist's First Amendment rights were not violated. Again, these cases apply to ***truthful testimony.*** Any adverse action taken by the government against Gilchrist, including the denial of her unemployment benefits, resulted from her misconduct, including ***knowingly giving false and/or misleading testimony.***

Justice Opala, in his concurring opinion to that of the Oklahoma Supreme Court, correctly determined that the denial of Gilchrist's claim for unemployment benefits did not violate the First Amendment's Free Speech Clause. He noted that:

> No constitutional barrier, federal or state, has been identified to prohibit the use of judicial analyses of a public employee's expert testimony as proof of unacceptable job performance. . . . No one would dare deny that the government has a compelling interest in maintaining acceptable job performance standards for its personnel.

(Pet. App. 13.)

Gilchrist was terminated, in part, based upon a published opinion by United States District Judge Ralph Thompson in a habeas corpus proceeding, *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. 1999). Gilchrist had testified for the prosecution in a rape and murder trial

held in the District Court of Oklahoma County. In connection with the habeas corpus proceeding, an evidentiary hearing was held. Gilchrist had testified at the criminal trial that the FBI's DNA analysis was "inconclusive" regarding whether any DNA sample may have matched Mitchell. However, the FBI chemist testified at the habeas corpus hearing that his report reflected that Mitchell's DNA was not found in the FBI testing. Gilchrist admitted at the habeas corpus hearing that the DNA evidence did, in fact, exclude Mitchell.

Judge Thompson concluded that Gilchrist's trial testimony concerning the inconclusiveness of the DNA evidence was untrue. On appeal from Judge Thompson's ruling in the habeas corpus matter, the United States Court of Appeals for the 10th Circuit stated:

> Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense.

Mitchell v. Gibson, 262 F.3d 1036, 1064 (10th Cir. 2001).

Upon receipt of Judge Thompson's opinion in *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. 1999), an intensive investigation of Gilchrist's conduct was initiated. Eventually, she was fired, not only for offering false and/or misleading testimony, but also for violating city personnel policies and police department rules, policies and procedures. For example, the Court of Criminal Appeals found that she violated a court order in a criminal matter. In *Pierce v. State*, 786 P.2d 1255, 1261, (Okla.Crim.App. 1990), the Court stated,

> We find that Gilchrist absolutely violated the terms of a Court Order. Instead of following either the letter of the Order or taking steps to have the Order changed or clarified by the court, she took it upon herself to determine the portions of the Order with which she wished to comply. This was not her decision to make. She was under a direct order from the court to provide *all* of the physical evidence to SERI. The failure to abide by a valid order by a trial court will generally have serious consequences and will always be considered error.

Gilchrist was terminated for a variety of reasons, including knowingly giving false and/or misleading testimony in criminal trials. This behavior amounted to misconduct sufficient to warrant a denial of her claim for unemployment benefits under Oklahoma law. The argument that her First Amendment rights were violated when her unemployment benefits were denied because she offered false and/or misleading testimony in criminal trials is without merit.

CONCLUSION

For the foregoing reasons, Respondent, the Oklahoma Employment Security Commission, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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JOYCE A. GILCHRIST,

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

RESPONDENT CITY OF OKLAHOMA CITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO PETITIONER'S STATEMENT OF QUESTION PRESENTED

This case involves more than an alleged expert whose testimony was "criticized." Ms. Gilchrist gave improper opinions, false and misleading testimony, and withheld exculpatory evidence from the prosecution, which in turn, lead the prosecution to withhold *Brady (v. Maryland*, 373 U.S. 83 (1963)) material from the defense. The First Amendment does not protect her false testimony nor her improper conduct and, therefore, the state's denial of unemployment benefits did not deprive her of her First Amendment rights.

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PETITIONER'S CHALLENGE TO THE OPINION OF THE OKLAHOMA SUPREME COURT

While it is true that the "opinion below" that Petitioner challenges is the Oklahoma Supreme Court's decision in *Gilchrist v. Board of Review of the Oklahoma Employment Security Commission,* 94 P.3d 72 (Okla. 2004), a copy of which is contained in Petitioner's Appendix, Petitioner fails to advise this Court that she also filed a 42 U.S.C. §1983 action against the City of Oklahoma City, the City Manager, the Police Chief, five individual members of the Oklahoma City Police Departmental Review Board, and four other employees or former employees of the City based upon her termination. In that action, she asserted, *inter alia,* that her First Amendment right to testify was violated by her termination. (*Gilchrist v. The City of Oklahoma City, et al.*, United States District Court for the Western District of Oklahoma, CIV-02-538 R). On June 7, 2004, the Honorable David Russell rejected, *inter alia*, her argument that her testimony at issue was protected by the First Amendment when he sustained the Motions for Summary Judgment filed by the City, the City Manager, the Police Chief, and the five Board Members. (A copy of that Order is contained in the City Appendix filed herewith.) She also fails to advise this Court that she is being sued by Jeffrey Todd Pierce, who claims that her actions resulted in the filing of criminal charges against him in 1986. Pierce was convicted of those charges and not released until 2001 after DNA tests revealed he was not the donor of the semen found on the victim's clothing. On March 2, 2004, the Tenth Circuit Court of Appeals affirmed the denial of her Motion to Dismiss in that action in which she claimed both absolute and qualified immunity. *Pierce v. Gilchrist,* 359 F.3d 1279 (10th Cir. 2004).

OBJECTION TO PETITIONER'S "STATEMENT"

Petitioner's admissions at p. 3 should be sufficient for this Court to deny her Petition for a Writ of Certiorari – namely, that Judge Thompson of the United States District Court for the Western District of Oklahoma in *Mitchell v. Ward*, 150 F.Supp.2d 1194 (W.D. Okla. 1999), reviewed her testimony (whether it be "expert" or otherwise) in the criminal case of *State v. Mitchell,*[1] and held that it was "without question, untrue" (150 F.Supp.2d 1226) and "terribly misleading, if not false" (150 F.Supp.2d 1229); that she was then terminated for this testimony;[2] and that she was then denied unemployment benefits because of her misconduct.

False testimony is not protected by the First Amendment. Gilchrist's conduct is and was repulsive to the jury system – a system designed to arrive at the truth. *Worrell v. Henry*, 219 F.3d 1197, 1205 (10th Cir. 2000). Gilchrist claims that cross-examination should be sufficient to arrive at the truth, ignoring that her failure to comply with the court orders in *Pierce v. State*, 786 P.2d 1255 (Okla. Cr. 1990), and *Miller v. State*, 809 P.2d 1317 (Okla. Cr. 1991); her attempts at trial by ambush in *Miller* and *McCarty v. State*, 765 P.2d 1215 (Okla. Cr. 1988); and her failure to provide *Brady* material in *Mitchell,* deprived the

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[1] The Oklahoma Court of Criminal Appeals' decision on the initial appeal of this case is reported at 884 P.2d 1186 (Okla. Cr. 1994). This Court denied *certiorari* in *Mitchell v. Oklahoma*, 516 U.S. 827 (1995). Mitchell's Application for Post-Conviction Relief was denied by the Oklahoma Court of Criminal Appeals in *Mitchell v. State*, 934 P.2d 346 (Okla. Cr. 1997). This Court denied *certiorari* in *Mitchell v. Oklahoma*, 521 U.S. 1108 (1997).

[2] As noted by Judge Russell's Order, this was not the only reason for which Petitioner was terminated. (City Appendix pp. 10-14.)

defense counsel of the appropriate means to efficiently cross-examine her.

In *State v. Mitchell*,[3] Mitchell was charged with rape, anal sodomy, kidnapping, and the murder of Elaine Scott. Gilchrist testified in the criminal trial that she found sperm on a vaginal swab (taken from Scott's body at the medical examiner's office), but was unable to identify the donor; that she found sperm on the rectal swab with the same blood type as Mitchell and Scott's boyfriend[4]; that blood, semen and sperm found on the sheet in which Scott's body was transported, was consistent with Mitchell and the boyfriend; that semen stains on the crotches of Scott's panties and jeans and the back of her panties were consistent with Mitchell and the boyfriend.[5]

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[3] At *Mitchell v. Ward*, 150 F.Supp.2d 1231, n. 54, Judge Thompson describes the horrific injuries Mitchell imposed upon Ms. Scott. After the remand by the Tenth Circuit, Mitchell was retried and again given the death penalty for this murder without Gilchrist's false and misleading testimony.

[4] Mitchell, during his appeal to the Oklahoma Court of Criminal Appeals, tried to attack the veracity of Gilchrist. At 884 P.2d 1186, 1199, the Court stated:

> Mitchell essentially claims that the evidence is sufficient because Gilchrist's findings and testimony cannot be trusted and are not corroborated (footnote omitted). This Court cannot distinguish between Gilchrist's veracity and that of other experts. Gilchrist's findings indicated the presence of sperm in the vaginal and anal canals (the latter consistent with Mitchell).

As noted by Judge Thompson at 150 F.Supp.2d 1227, n. 49, the Court of Criminal Appeals "misunderstood" the State's evidence regarding the donor of semen on Scott's panties. Gilchrist's testimony mislead the jury and the appellate court.

[5] Her findings of sperm on certain slides were disputed by Brian Wraxall who testified that he had examined the rectal swab slide, which supposedly contained sperm and found none; that he examined

(Continued on following page)

(150 F.Supp.2d 1223.) Prior to trial, several articles of evidence were sent to the FBI lab for DNA analysis. An agent of the FBI wrote a report, which was furnished to both the prosecution and the defense. Gilchrist testified at the trial that the FBI DNA analysis as to Mitchell was "inconclusive." (150 F.Supp.2d 1223.) Mitchell was convicted of all the charges despite his denial of any sexual act except masturbating over the dying body of Ms. Scott. (884 P.2d 1186, 1199 at n. 32 and 150 F.Supp.2d 1221-22.) After exhausting his appeals and his post-conviction relief, Mitchell filed a Petition for the Writ of *Habeas Corpus* in the United States District Court and alleged, *inter alia*, that he was denied access to exculpatory evidence regarding the sexual convictions and the credibility of certain witnesses (*i.e.*, Gilchrist). (150 F.Supp.2d 1220.) Mitchell was allowed discovery which produced notes of Gilchrist regarding conversations she had had with the FBI chemist regarding his DNA results prior to her testifying in the criminal trial. (150 F.Supp.2d 1224.) These notes show that she was told that the DNA results indicated that the stains on the panties were consistent with the DNA of Scott and her boyfriend only. (150 F.Supp.2d 1224-25.) Judge Thompson granted Mitchell an evidentiary hearing. Gilchrist testified at the evidentiary hearing that her own, separate forensic analysis had excluded Mitchell. (150 F.Supp.2d 1227, n. 48.) Judge Thompson held that Gilchrist's trial testimony that the FBI DNA analysis was inconclusive as to Mitchell was "without question, untrue." (150 F.Supp.2d 1226.) Judge Thompson further recited at

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the eluate from the rectal swab and found no sperm; and that he examined a slide from the crotch of the jeans that was represented as containing sperm and found none. (150 F.Supp.2d 1224, n. 38.)

150 F.Supp.2d 1229, n. 52, the "often-cited criticisms" of her by the Oklahoma Court of Criminal Appeals. As a result of Gilchrist's false and misleading trial testimony, Judge Thompson reversed Mitchell's convictions on the rape and anal sodomy charges. (150 F.Supp.2d 1230 and 1262-1263.) He upheld the murder conviction and the death penalty. Mitchell appealed, and because of Gilchrist's testimony (and inactions) and the arguments of the prosecutor based upon her testimony, the Tenth Circuit Court of Appeals reversed the death penalty. *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001). In doing so, the Court stated at 262 F.3d 1064:

> *Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense. Compounding this improper conduct was that of the prosecutor, whom the District Court found had "labored extensively at trial to obscure the true DNA test results and to highlight Gilchrist's test results," and whose characterization of the FBI report in his closing argument was "entirely unsupported by evidence and . . . misleading."* (Emphasis the Court's.)

At 262 F.3d 1065, n. 16, the Court also stated:

> Even if Mr. Mitchell had proceeded to trial on the charges, Ms. Gilchrist's notes of her conversations with Agent Vick, which indicated her knowledge that the DNA testing excluded Mr. Mitchell, would have provided very effective ammunition in defense counsel's ability to impeach her credibility. In our view, depriving defense counsel of the ability to demonstrate the untruthfulness of Ms. Gilchrist's critical testimony to the

> jury also raises a reasonable probability that the outcome of the proceedings would have been different with respect to the rape and sodomy convictions.

As stated earlier, at n. 52, 150 F.Supp.2d 1229, Judge Thompson cited to other published cases involving Gilchrist's testimony and conduct. This footnote states in part:

> *See, McCarty v. State,* 765 P.2d 1215, 1217-19 (Okla.Crim.App. 1988) (Gilchrist's delay in disclosing hair evidence to the defense was "inexcusable" and deprived defendant of fair trial. Gilchrist's report regarding her examination of evidence was "at best incomplete, and at worse inaccurate and misleading." The significant omission, "whether intentional or inadvertent, resulted in trial by ambush." Gilchrist gave improper opinion which she was unquestionably unqualified to give and which was not supported by the state of the art of forensic science; court noted conclusion of Southwestern Association of Forensic Scientists, Inc. that Gilchrist had violated ethical code.); *Fox v. State*, 779 P.2d 562, 571-72 (Okla.Crim.App. 1989) (Gilchrist testified to a conclusion which was not scientifically supported.); *Pierce v. State*, 786 P.2d 1255, 1261 (Okla.Crim.App. 1990) (Gilchrist violated trial court's order to forward evidence to laboratory designated by defense.); *Miller v. State*, 809 P.2d 1317, 1319-20 (Okla.Crim.App. 1991) (Gilchrist did not transmit evidence to defense expert until two weeks after court-ordered deadline and six and one-half days before trial. Gilchrist's report omitted crucial conclusion. The significant omission, together with State's extreme tardiness in

> complying with discovery order, "resulted in trial by ambush on a very critical piece of evidence.")

In its opinion affirming the denial of unemployment benefits to Gilchrist, the Oklahoma Supreme Court cited to Gilchrist's misconduct in *Mitchell v. Ward*, and *McCarty v. State*, 765 P.2d 1215 and further stated at 94 P.3d 72, 75-76, (Appendix p. 6; n. 2 is at Appendix p. 9):

> The record also contains other opinions that criticized Gilchrist's conduct in other criminal prosecutions.[2]

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[2] Those opinions are: *McCarty v. State*, 1995 OK CR 48, 904 P.2d 110; *Cannon v. Gibson*, 259 F.3d 1253 (10th Cir. 2001); *Pierce v. State*, 1990 OK CR 7, 786 P.2d 1255; *Ables v. State*, OK CR F-1986-776 (unpublished); and *Fox v. State*, 1989 OK CR 51, 779 P.2d 562.

As a result of Judge Thompson's opinion, the Oklahoma City Police Department began an investigation into Ms. Gilchrist's conduct. (Appendix pp. 3-4.) This investigation revealed, among other things, that she had originally failed to examine certain evidence in a murder, which resulted in the two defendants being given the death penalty and both of whom have now been executed by the State of Oklahoma. *State v. LaFevers*, appealed at *LaFevers v. State*, 819 P.2d 1362 (Okla. Cr. 1991)[6], and *State v.*

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[6] Appeal after remand, *LaFevers v. State*, 897 P.2d 292 (Okla. Cr. 1995), *cert. denied*, *LaFevers v. Oklahoma*, 516 U.S. 1095 (1996), post-conviction relief denied, *LaFevers v. State*, 934 P.2d 356 (Okla. Cr. 1997), denial of habeas corpus affirmed, *LaFevers v. Gibson*, 182 F.3d 705 (10th Cir. 1999), reversal of denial of post-conviction relief, *LaFevers v. Gibson*, 208 F.3d 226 (10th Cir. 2000), application denied, *Gibson*

(Continued on following page)

Cannon, appealed at *Cannon v. State*, 827 P.2d 1339 (Okla. Cr. 1995)[7]. In March 2000, she analyzed this evidence, wrote a report and sent it to both the prosecution and the defense without having the evidence peer reviewed despite orders to do so. (City Appendix pp. 5; 25 and at nn. 22 and 23 at p. 25.) In *Cannon v. Gibson*, 259 F.3d 1253 (10th Cir. 2001), the Tenth Circuit Court of Appeals stated at 259 F.3d 1275, n. 22:

> This Court recognizes that recently information has come to light casting serious doubt on the veracity of Gilchrist's testimony in a large number of criminal prosecutions. *See generally* CBS News/60 Minutes II, *Under the Microscope*, (May 9, 2001) http://www.cbsnews.com/now/story/0,1597,290046-412,000.shtml (noting that Gilchrist is the "target of several investigations," including an FBI investigation and nothing that "there are growing concerns that she may have put people in prison with more sorcery than science"). In fact, there is serious reason to doubt the veracity of Gilchrist's testimony in this particular case. *See Lafevers*, 238 F.3d at 1266 (recounting evidence supporting assertion that Gilchrist lied during LaFevers' trial as to whether electrophoresis testing had been conducted on Exhibit 83, the pants attributed to LaFevers, prior to trial). In light of this new information, Canon has presented this Court with a "Request to Hold Appeal

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v. LaFevers, 529 U.S. 1013 (2000), dismissal of habeas corpus affirmed, 238 F.3d 1263 (10th Cir. 2001).

[7] Appeal after remand, *Cannon v. State*, 904 P.2d 89 (Okla. Cr. 1995), *cert. denied*, *Cannon v. Oklahoma*, 516 U.S. 1176 (1996), *post-conviction relief denied*, *Cannon v. State*, 993 P.2d 926 (Okla. Cr. 1997), denial of habeas corpus affirmed, *Cannon v. Gibson*, 259 F.3d 1253 (10th Cir. 2001), *cert. denied*, *Cannon v. Gibson*, 535 U.S. 1080 (2002).

> in Abeyance Pending DNA Testing" (the "Request"). In the Request, Cannon avers that funding has become available to conduct DNA testing on Exhibit 84 and reasserts the arguments set forth in this brief with regard to the alleged important role Exhibit 84 played in his trial. This Court is sympathetic to Cannon's concerns regarding the possibility that Gilchrist testified falsely during his trial. Nevertheless, as noted at some length below, this Court is firmly convinced that even factoring the blood-splatter evidence out of the equation, there does not exist a reasonable probability that the result of the penalty phase would have been different.

The FBI was asked to examine some of Ms. Gilchrist's case work. (City Appendix pp. 5-6.) Special Agent Doug Deedrick authored a report concerning her work in eight cases, included that of *Pierce v. State*, 786 P.2d 1255 (Okla. Cr. 1990). As noted by the Tenth Circuit Court of Appeals in *Pierce v. Gilchrist*, 359 F.3d 1279, 1283 (10th Cir. 2004):

> Special Agent Deedrick found that at least five of the cases involved contrived and erroneous statements by Ms. Gilchrist regarding identification of persons, and that Ms. Gilchrist repeatedly made statements beyond the limits of forensic science. With regard to Mr. Pierce's case specifically, Special Agent Deedrick concluded that none of the hairs taken from Plaintiff's body exhibited the same microscopic characteristics as those found at the crime scene.

According to the Plaintiff in that case, Gilchrist identified a total of 33 scalp and pubic hairs from the crime scene as microscopically consistent with Mr. Pierce's reference hairs when, in fact, none were. (359 F.3d 1282.)

The Police Department convened a predetermination review board, gave Gilchrist notice of the hearing, and all its evidence. (City Appendix pp. 7-8.) After two continuations requested by Gilchrist, the hearing began. (City Appendix p. 9.) The hearing lasted eight days. (City Appendix p. 9.) The Board deliberated six more days and found that Gilchrist violated the Department's Policies, Procedures and Rules, gave untruthful testimony in various Court cases, lied to a supervisor, destroyed evidence, and wasted City funds. (City Appendix pp. 10-14; 24-25.) Their recommendation was based on more than just her false and misleading testimony. The Board recommended that Chief Berry terminate Gilchrist's employment with the City, and he did. (City Appendix pp. 10-14.)

Gilchrist applied for unemployment benefits. Her request was denied by the Oklahoma Employment Security Commission, as it was determined that the reasons for her termination constituted willful and/or intentional misconduct connected with work, thereby disqualifying her for benefits. 40 O.S. §2-406. This finding was upheld by the Oklahoma Employment Security Commission Appeal Tribunal, its Board of Review, an Oklahoma County District Court Judge, and the Oklahoma Supreme Court. (Appendix at 4.)

The first reported decision involving Gilchrist's improper conduct was the Oklahoma Court of Criminal Appeals' 1988 opinion in *McCarty v. State*, 765 P.2d 1215 (Okla. Cr. 1988). The Court stated at 765 P.2d 1218-19:

> Whether or not Ms. Gilchrist's opinion constituted an improper personal expression of the appellant's guilt, her opinion that appellant was in fact present when violence was done to the victim

> was an improper expert opinion, because it was beyond Gilchrist's personal knowledge, as testified to by both Ms. Gilchrist and Mr. Wilson. Our conclusion is buttressed by the fact that on December 14, 1987, Max Courtney, President of the Southwestern Association of Forensic Scientists, Inc., issued a prepared statement of the Board of Directors concerning allegations of professional misconduct lodged against Ms. Gilchrist. A certified copy of this statement, which was filed with this Court on January 4, 1988, concluded that Ms. Gilchrist had violated the ethical code, but interestingly she was not disciplined. That statement reads in relevant part: "Our Professional Conduct Committee thoroughly investigated the allegations against Ms. Joyce Gilchrist and . . . communicated with [her] that she should distinguish personal opinion from opinions based upon facts derived from scientific evaluation . . . We further conclude that in our system of jurisprudence, undue pressure can be placed upon the forensic scientist to offer personal opinions beyond the scope of scientific capabilities." (Supp. Ex.) On the basis of the foregoing, we hold that such personal opinions beyond the scope of scientific capabilities have no place in a criminal trial, and are inadmissible under 12 O.S. 1981, §2703. Moreover, because Gilchrist's so-called expert opinion was actually a personal opinion beyond the scope of present scientific capabilities, it should have been excluded by the trial judge because its probative value was substantially outweighed by the dangers of unfair prejudice and misleading the jury under 12 O.S. 1981, §2403.

The Court reversed McCarty's murder conviction because of Gilchrist's delay in completing her forensic report (765 P.2d 1217); her delay in mailing the evidence to the defense

expert (765 P.2d 1217); her omission from the forensic report of her conclusion that a pubic hair found on the victim's chest was consistent with the defendant's pubic hair (and therefore, her report "was at least incomplete, and at worst inaccurate and misleading" 765 P.2d 1218)[8]; her omission resulted in trial by ambush (765 P.2d 1218); her giving of an improper opinion[9] (765 P.2d 1218); and her testifying as to possible procedures by the medical examiner when performing the autopsy at which she was not present. (765 P.2d 1218-19.) Regarding her testimony that the defendant was present when the violence was done to the victim, the Court stated at 765 P.2d 1218:

> We find that the admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data "of a type reasonably relied upon by experts in the particular field" in forming such an opinion. *See* 12 O.S. 1981, §2703. Ms. Gilchrist herself testified that forensic science techniques had not advanced to the point where a person could be positively identified through blood types, secretor status, or hair examination. (Tr. VII, 159) We find it inconceivable why Ms. Gilchrist would give such an improper opinion, which she admitted she was not qualified to give.

McCarty was retried and convicted again. In the appeal of his second conviction, *McCarty v. State*, 904 P.2d 110 (Okla. Cr. 1995), the Court held that one of Gilchrist's

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[8] This hair is now "missing" as is the hair found in the victim's knife wound.

[9] The improper opinion was that McCarty was present when violence was done to the victim. (765 P.2d 1218-20.)

"remarks" in her testimony in the second trial "bordered upon impropriety" but was not so significant as to be misleading to the jury. (904 P.2d 126.)

In 1989, in an unpublished opinion, the Oklahoma Court of Criminal Appeals reversed the first-degree murder and first-degree rape convictions of James Lucas Abels, Jr., based upon the improper testimony of Gilchrist. The testimony was again that, based upon her analysis of the forensic evidence, the defendant was present when the victim was killed. (City Appendix pp. 19-20 at n. 18.)

The Oklahoma Court of Criminal Appeals' opinion in *Fox v. State*, 779 P.2d 562, 571-72 (Okla. Cr. 1989), states:

> Ms. Gilchrist admitted that an individual could not be positively identified by hair evidence. However, she went on to testify that, "[in] her opinion . . . Mark Fowler and Bill Fox were in contact with John Barrier prior to death." (Tr. 1581). The lack of scientific weight of such a conclusion is apparent on reflection by those dealing with similar evidence on a regular basis. But to a lay jury, usually ill-equipped to assimilate hair analysis finding on their own, such an opinion may appear too substantial.
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> . . .
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> While opinion testimony of an expert is properly admissible, such a witness should not be encouraged by the prosecution or the defense to give imprecise conclusions. Had the imprecision of this conclusion not been exposed on cross-examination and by the testimony of the defense's expert, Samuel Palenik, error may have resulted.

The Oklahoma Court of Criminal Appeals stated in *Pierce v. State*, 786 P.2d 1255, 1261 (Okla. Cr. 1990):

> We find that Gilchrist absolutely violated the terms of a Court Order. Instead of following either the letter of the Order or taking steps to have the Order changed or clarified by the court, she took it upon herself to determine the portions of the Order with which she wished to comply. This was not her decision to make. She was under a direct order from the court to provide *all* of the physical evidence to SERI. The failure to abide by a valid order by a trial court will generally have serious consequences and will always be considered error.

During the Department's investigation of Ms. Gilchrist, the Oklahoma Indigent Defense System asked another forensic chemist of the OCPD to review the evidence in the *Pierce* case. That chemist reviewed certain slides of evidence that Gilchrist had testified contained sperm and could find sperm on only one. She asked the other chemists to review the slides, and they could find sperm on only the one slide. The six slides that no other chemist could find sperm on were submitted to the Oklahoma State Bureau of Investigation and its chemist could not find sperm. (City Appendix pp. 4-5.)

Brian Wraxall of the Serological Research Institute (SERI) was asked to review Gilchrist's testimony in the *Pierce* case. His report stated in part that her testimony " . . . implies that the semen donor occurs in a small percentage of the population which includes Mr. Pierce, when in fact, the semen donor could be any male in the population." Further, this report stated her testimony " . . . show[ed] a total disregard for the results of her analysis

and a prejudice against the defendant." (City Appendix p. 8 at nn. 5 and 6.) This report also established that Gilchrist's testimony was contrary to her training at SERI in 1981. (City Appendix p. 8 at n. 6.)

In *Miller v. State*, 809 P.2d 1317, 1319-20 (Okla. Cr. 1991), the Court held that Ms. Gilchrist violated a Court order in mailing the hair evidence to the defense expert two weeks after it was due and that, combined with her failure to note an alleged "unique characteristic of Miller's pubic hair" in her forensic report, resulted in trial by ambush. Gilchrist violated the Court's Order twice in this case – the first time when she sent out the serological evidence one day after it was due, and the second time when she mailed out the hair evidence two weeks late. This conviction was also reversed for a new trial. 809 P.2d 1319. The Court further stated:

> What is even more disturbing than the State's tardiness in providing the evidence to the appellant is the fact that Ms. Gilchrist's pretrial forensic report made absolutely no mention of her finding of a "unique characteristic" concerning appellant's pubic hairs. However, in his opening argument, the prosecutor alerted the jury to the State's expert's finding of the "unique characteristic." Clearly, this significant omission in Ms. Gilchrist's report, whether intentional or inadvertent, coupled with the State's extreme tardiness in complying with the discovery order, resulted in trial by ambush on a very critical piece of evidence. *See McCarty*, 765 P.2d at 1218.
>
> One of the reasons given for not granting the continuance was due to the fact the victim was on active duty and the trial would have to be put off until September, 1986, if granted. The courts,

> State and defense all have plenty to do, but one person in the chain is the defendant who is to have a fair trial, if not a perfect one. *Jones v. State*, 610 P.2d 818 (Okl. Cr. 1980). Counsel must have assistance to prepare a defense and to cross-examine the State's expert. The appellant must have an attorney that is "effective". This requires time to prepare, time to consult with experts and time to be ready for effective cross-examination of the State's expert. We find that the trial court's denial of appellant's Motion for Continuance was a denial of appellant's right to due process and fundamental fairness guaranteed by the Fourteenth Amendment and Article II, Section 20 of the Oklahoma Constitution.

Miller, 809 P.2d at 1320 (some citations omitted). Thus, the Court held that the denial of the continuance was improper because of Gilchrist's conduct. Contrary to her argument in the Petition, Gilchrist's testimony and conduct impeded defense counsels' ability to cross-examine her and obstructed juries' attempts to arrive at the truth.

REASONS FOR DENIAL OF THE PETITION

Contrary to Petitioner's statement at p. 16, this is *not* a case of first impression. This Court has repeatedly rejected any claim that the First Amendment to the United States Constitution protects false statements of fact. As the Oklahoma Supreme Court stated in *State, ex rel, Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 969 (Okla. 1988):

> False speech does not foster First Amendment protection, *Time v. Pape,* 401 U.S. 1015, 91 S.Ct. 1248, 28 L.Ed.2d 552 (1971), because there is no

> constitutional value in false statements of fact. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). See also, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

The Petitioner attempts to downplay those cases by her repeated claim that "I was only expressing my opinion", ignoring that some of her alleged expert testimony were expressions of scientific "facts" and that no other scientist could duplicate Gilchrist's results. Gilchrist testified "I observed sperm", "The hairs are consistent", "The blood types are the same", not "I believe that Mitchell raped Scott."

Gilchrist ignores that she has been repeatedly told she cannot express her personal beliefs (if this is what they are), in a court of law. Gilchrist also ignores that her conduct, not just her testimony, was at issue. In *Mitchell*, she intentionally withheld exculpatory information from the prosecution, who in turn withheld it from the defense in a murder/rape trial, and then she testified contrary to the evidence.[10]

At 94 P.3d 72, 75 (Appendix, p. 6), the Oklahoma Supreme Court stated:

> We hold that Gilchrist's conduct in *Mitchell*, that is knowingly giving false and misleading testimony in a criminal case, constituted "misconduct"

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[10] In *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001), the Tenth Circuit Court of Appeals stated "*Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in a sexual assault of the victim, which she knew was rendered false and misleading by evidence withheld from the defense.*" (Emphasis the Court's.) *See also* 262 F.3d 1065 n. 16 and City Appendix p. 4 at n. 3.

> sufficient to support the denial of unemployment benefits under §2-406, as defined in *Vester*, 1985 OK 21, ¶ 15, 697 P.2d 533, 538. Nothing could be more fundamental than the obligation of a forensic chemist employed by a police department to give testimony that is both honest and fair. Only in this way can our criminal justice system itself be regarded as both honest and fair. Clearly, Gilchrist did not satisfy that standard when she testified in *Mitchell* that the DNA evidence was "inconclusive," despite having been told by the FBI chemist that the DNA was *not* Mitchell's." (Emphasis the Court's.)

Further, as Judge Russell held in rejecting Gilchrist's First Amendment wrongful termination claim (City Appendix p. 23):

> The Court finds no legal support for Ms. Gilchrist's argument that untruthful testimony is nevertheless protected unless the defendant makes a showing that it was knowingly or recklessly false.[20] The Defendants have adequately shown that they reasonably believed Ms. Gilchrist's testimony to be truthful; thus the Defendants were entitled to discharge her. *Wright v. Illinois Department of Children & Family Services,* 40 F.3d 1492, 1506 (7th Cir. 1994). *See also Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 687 (1994). Moreover, to the extent that knowledge of falsity or reckless is required, the Defendants have offered undisputed evidence showing that Ms. Gilchrist knowingly or recklessly gave false testimony in the *Mitchell* case.

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[20] The suggestion that untruthful testimony is protected in the absence of a showing of knowing or reckless falsity is particularly troubling in

> the present context, i.e., where a forensic expert repeatedly testifies beyond the scope of accepted principles of forensic science, that a defendant *is* the source of certain physical evidence found on the victim or at the crime scene. A governmental employer should not be required to make a further showing that the discharged employee's testimony was knowingly or recklessly false. (Emphasis the Court's.)

Gilchrist's newest claim at p. 17, number 2.A., is even more "troubling" in that she now claims an expert that knowingly gives false testimony should be granted "immunity." Apparently she wants this Court to overrule authorization of perjury prosecutions in *Briscoe v. LaHue*, 460 U.S. 325 (1983), at least as to expert witnesses. As Justice Opala stated in his concurring Opinion at 94 P.3d 78, n. 11, Appendix at p. 16, this Court, in granting prosecutors immunity from civil suits under 42 U.S.C. §1983, based upon the common law, acknowledges that they are still subject to professional discipline. While prosecutors have no claim to First Amendment immunity, their common law protection is not as broad as Gilchrist claims expert witness immunity should be.

Gilchrist claims her personal beliefs are protected, apparently attempting to argue that she believed Mitchell raped Ms. Scott, and therefore, she can testify as to her personal belief. *See* her citation to *Branti v. Finkel*, 445 U.S. 507, 515 (1980) at p. 12 of the Petition, and her statement at number 3.A., p. 17. She ignores that the Oklahoma Court of Criminal Appeals and Southwest Association of Forensic Scientists, Inc. told her she could not testify regarding her personal opinion while appearing as an expert witness. (*McCarty v. State*, 765 P.2d 1215, 1218-19, quoted herein at p. 8.)

This Court's opinion in *Branti v. Finkel*, 445 U.S. 507, 515 (1980), belies Gilchrist's claim that an expert witness has an absolute First Amendment protection in testifying as to her beliefs. As this Court stated at 445 U.S. 515:

> Under this line of analysis, unless the government can demonstrate "an overriding interest," 427 US, at 368, 96 SCt 2687, "of vital importance," *id.*, at 362, 96 SCt at 2684, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

Everyone, including the City, has "an overriding interest . . . of vital importance" to see that defendants in criminal cases get a fair trial, including but not limited to, expert witnesses who tell the truth. The City can require that its employees conform to this belief.

Gilchrist's reliance upon this Court's opinion in *Pickering v. Board of Education*, 391 U.S. 563 (1968) is also misplaced, as this Court stated at 391 U.S. 572-73:

> The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts.
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> . . .
>
> What we do have before us is a case in which a teacher has made erroneous public statements

> upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom[5] or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.
>
> [5] We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

The fact that no scientist could duplicate Gilchrist's "findings" calls her fitness to perform into question.[11] Her testimony is evidence of her general lack of competence. (Concurring Opinion of Justice Opala, 94 P.3d 72, 79-80, Appendix at 12-14.)

This Court's approval of a perjury prosecution for false testimony in *Briscoe v. LaHue*, 460 U.S. 325, 331 (1983), further eviscerates Gilchrist's First Amendment claim. If it is a violation of the First Amendment to terminate an

[11] *See Mitchell v. Ward*, 150 F.Supp.2d 1194, 1224 n. 38. *See also Pierce v. Gilchrist*, 359 F.3d 1279, 1283 and City Appendix pp. 4-6; 8-9.

employee who gave false and misleading testimony (or in this case, deny unemployment benefits to an applicant whose termination was partly caused by her giving false and misleading testimony), it would be a violation of the First Amendment to charge, much less convict, someone of perjury for giving false testimony. *In Briscoe*, this Court held that a witness who may have committed perjury in testifying in a criminal trial is immune from liability in a subsequent lawsuit seeking damages filed under 42 U.S.C. §1983, by the person convicted, but has nothing to do with whether an employer could lawfully discipline, including terminate, the employee who gave false testimony. It has nothing to do with whether it is proper to deny unemployment compensation to such employee. (Concurring Opinion of Justice Opala, 94 P.3d 72, 77-78, Appendix pp. 10-11.) The decision in *Briscoe* was based on common law witness immunity and not on the First Amendment. (460 U.S. 345.) Gilchrist offers no common law authority that an expert witness who testified untruthfully was protected by immunity from any adverse action, and therefore, her request that this Court grant her Petition and extend *Briscoe's* immunity to all sanctions against a lying expert witness should be denied. At p. 17, number 2.A., Gilchrist appears to confuse the common law witness immunity from monetary damages with the First Amendment right of free speech.

Gilchrist does not discuss the plurality decision of this Court in *Waters v. Churchill*, 511 U.S. 661 (1994), in which this Court held that an employer who makes a reasonable investigation into an employee's speech and believes it to be false (even though it turns out to be true) can still lawfully discipline an employee without violating the First

Amendment. The plurality opinion states at 511 U.S. 661, 675:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Gilchrist refuses to acknowledge that the various opinions of the Circuit Courts that give First Amendment protection to an employee's testimony require that the testimony be truthful. She even quotes from one such case. (Petition at pp. 5, 7-8 citing to *Worrell v. Henry,* 219 F.3d 1197 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).) In *Worrell*, the Tenth Circuit Court of Appeals states:

> In order to encourage *truthful* and uninhibited testimony, the law has long afforded certain protections to witnesses.
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> . . .
>
> In the last few decades, federal courts have afforded additional protection to witnesses who are employed by the government, concluding that *truthful* testimony is protected by the First Amendment and that a government employee

> may not be fired or subjected to other adverse action as a result of such testimony. *See, e.g., Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989), *vacated on other grounds,* 928 F.2d 920 (10th Cir. 1991) (en banc); *see also Pro v. Donatucci*, 81 F.3d 1283, 1291 (3d Cir. 1996); *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982).
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> . . .
>
> The Fifth Circuit's decision in *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), provides an overview of the reasons for protecting government employees' testimony. Absent such protection, employers seeking to silence *truthful* testimony could present employees with a difficult choice. "Employees could either testify *truthfully* and lose their jobs or could lie to the tribunal and protect their job security." *Id.* at 1578. Either choice would come at too high a price: "Those able to risk job security would suffer state-sponsored retaliation for speaking the *truth* before a body entrusted with the task of discovering the *truth*." *Id.* On the other hand, "[t]hose unwilling or unable to risk unemployment would scuttle our efforts to arrive at the *truth*." *Id.* Affording constitutional protection to the *truthful* testimony of public employees protects both employees' interest in free expression and the judicial system's interest in arriving at the *truth*. *Id; see also Smith*, 693 F.2d at 368 (concluding that the "[F]irst [A]mendment protects the right to testify *truthfully* at trial" and that such protection is also supported by "the right of a defendant at trial to compulsory process and the goal of our criminal justice system to arrive at the *truth*").

Worrell, 219 F.3d at 1204-05 (emphasis added).

Gilchrist never explains how her false testimony nor her withholding exculpatory evidence assisted any jury in arriving at the truth.

The Tenth Circuit Court in *Worrell* noted that the protection of truthful testimony is "not absolute":

> There are instances in which government entities' interests as employers outweigh employees' interests in free expression and the policy of encouraging truthful and uninhibited testimony. *See Waters v. Churchill*, 511 U.S. 661, 674-75, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) ("When [an employee] . . . begins to do or say things that detract from the agency's effective operation, the government must have some power to restrain [him]."); *Tedder v. Norman*, 167 F.3d 1213, 1215 (8th Cir. 1999) (concluding that employer's interest in avoiding disruption in the workplace outweighed employee's interest in giving voluntary testimony); *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 887-89 (3d Cir. 1997) (same). A public employee's testimony may impair discipline by supervisors or harmony among coworkers; it may undermine close working relationships based on loyalty and confidence; it may impede the performance of an employee's duties or the regular operations of the enterprise. *See Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Lytle v. City of Haysville*, 138 F.3d 857, 863-64 (10th Cir. 1998).

Worrell, 219 F.3d at 1205.

Lastly, in *Worrell,* the Tenth Circuit held it was not a violation of the First Amendment right of the plaintiff for a

prospective governmental employer to deny him a job because of his past truthful testimony, if the testimony would disrupt the relationship that the prospective employer may have with the organization he had testified against. *Id.* at 1209.

Judge Thompson and the appellate Judges of both the Oklahoma Court of Criminal Appeals and of the Tenth Circuit Court of Appeals have labeled Gilchrist's testimony as false, misleading, untrue, *etc.* It is not protected by the First Amendment to the United States Constitution. For Gilchrist to claim that a Court disagrees with the content of her testimony is as misleading as is her testimony. At pp. 9-10, she appears to assert that the denial of her unemployment benefits, *inter alia*, for false and misleading testimony somehow violates the public's right to hear her testimony. The City disputes that she can assert the rights of "the jury." Additionally, in all her pleadings to date, Gilchrist ignores the right of criminal defendants to have a fair trial.

Gilchrist repeatedly states that her false statements were not knowingly nor recklessly made. *See* pp. 11, 12, and 18 of the Petition. Such statements ignore the opinions of Judge Thompson and of the Tenth Circuit Court in *Mitchell v. Gibson*. In *Mitchell v. Ward*, 150 F.Supp.2d 1194 at 1223, Judge Thompson stated:

> Further, Gilchrist identified and tested semen stains on the crotches of Ms. Scott's panties and jeans and the back of Ms. Scott's panties. She testified the sperm she found were consistent with both Petitioner and Taylor. *Id.* at 1000-1001, 1028-29.

And at 150 F.Supp.2d 1129:

> When she testified at trial, Gilchrist knew the semen on Ms. Scott's panties was not consistent with both Petitioner and Taylor. She knew the semen was at least a preliminary match for Taylor *and* that Petitioner's DNA had *not* been found on the panties. Thus, the DNA test results were far from inconclusive. (Emphasis the Court's.)

She ignores Judge Russell's Opinion of her testimony contained at City Appendix p. 23.

Again, she knew that Mitchell was excluded by her own PGM test. (150 F.Supp.2d 1227, n. 48.) Her statement ignores the language of the Tenth Circuit Court of Appeals from *Mitchell v. Gibson*, quoted herein at pp. 4 and 12 at n. 10.

CONCLUSION

It is true that if this Court were to accept the Petition and issue its Opinion consistent with *Briscoe v. LaHue, Time v. Pape, Waters v. Churchill,* and *Pickering v. Board of Education,* and with the various decisions of the Circuit Courts which hold that testimony is protected under the First Amendment only if it is truthful, that Gilchrist's false and misleading testimony was not protected (nor was her improper conduct), then her upcoming appeal of Judge Russell's Order in *Gilchrist v. City,* may be avoided. However, this author is under an obligation by Rule 15.2. of this Court to point out perceived misstatements of law or fact in the Petition. Simply put, there is ample authority under this Court's prior opinions, opinions of the various Circuit Courts, and under Oklahoma law, that an

expert witness who gives false and misleading testimony is not protected by the First Amendment from termination and from a finding she committed intentional misconduct, thus causing the denial of her claim for unemployment benefits. The Petition should be denied.

Respectfully submitted,

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No. 04-406

In The Supreme Court of the United States

JOYCE A. GILCHRIST,

Petitioner,

v.

BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION, THE OKLAHOMA SECURITY COMMISSION, AND THE CITY OF OKLAHOMA CITY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

CITY APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOYCE A. GILCHRIST,	)	
Plaintiff,	)	
	)	**Case No.**
vs.	)	**CIV-02-538-R**
THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation; JAMES D. COUCH, in his official capacity as City Manager; M. T. BERRY, individually and in his capacity as Chief of Police; ROBERT A. JONES, individually and in his official capacity as Deputy Chief of Police; BILL CITTY, individually and in his official capacity as Assistant Police Chief; KEN McDONALD, individually and in his official capacity as Major with the Oklahoma City Police Department; JOHNNY KUHLMAN, individually and in his official capacity as Major with the Oklahoma City Police Department; RICHARD DAWES, individually and in his official capacity as Chemist Supervisor with the Oklahoma City Police Department; MATTHEW SCOTT, individually and in his official capacity as Chemist with the Oklahoma City Police Department; GAROLD SPENCER, individually and in his official	)	

capacity as Major with the Oklahoma City Police Department; BYRON BOSHELL, individually and in his official capacity as Captain with the Oklahoma City Police Department; LAURA SCHILE, individually and in her official capacity was forensic chemist with the Oklahoma City Police Department;

Defendants.

ORDER

Before the Court are the motion for summary judgment of Defendant M. T. Berry, the motion for summary judgment of Defendant James Couch, the joint motion for summary judgment of Defendants Bill Citty, Ken McDonald, Johnny Kuhlman, Richard Dawes and Matthew Scott, and the motion for summary judgment of the City of Oklahoma City.

I. Summary of the Evidence.

The Plaintiff, Joyce A. Gilchrist, was employed by the City of Oklahoma City and assigned to the police department's forensic laboratory beginning in 1980. Ms. Gilchrist was promoted to the position of forensic chemist in August 1990. During her employment with the City, Ms. Gilchrist received numerous commendations and letters of appreciation from her superiors as well as officials with the Oklahoma County District Attorney's office.

In June 1998, Ms. Gilchrist reported to Defendant Berry that a female contractor identified as Ms. Roby had

complained that Defendant Garold Spencer had harassed her. On July 6, 1998, Defendant Berry directed Lieutenant Coventon of the Public Integrity Unit to interview Ms. Gilchrist concerning her conversation with Ms. Roby. Defendant Johnny Kuhlman interviewed Ms. Roby. Ms. Roby advised Defendant Kuhlman that "nothing happened in Oklahoma," and that she "did not want this matter pursued further." (Defendant Berry's Exhibit Nos. 4 and 6). No disciplinary action was taken against Defendant Spencer.

According to the Defendants' evidence, police department officials became increasingly concerned about Ms. Gilchrist's credibility and her forensic work in late 1999, after reviewing the published opinion of the Honorable Ralph Thompson of this District in *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W. D. Okla. 1999). In *Mitchell, supra,* Judge Thompson concluded that Ms. Gilchrist had given "untrue"[1] and "misleading"[2] testimony in the rape and

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[1] Judge Thompson found: "Gilchrist's trial testimony that DNA analysis performed by the FBI was 'inconclusive' 'as to [Petitioner]' was, without question, untrue." 150 F. Supp. 2d 1194, 1226. Judge Thompson explained that when she testified at Mr. Mitchell's trial, Ms. Gilchrist knew that the DNA testing of semen found on the victim's clothing showed at least a preliminary match with another individual, and that Mr. Mitchell's DNA had not been found on the victim's clothing. 150 F. Supp. 2d at 1228-1229.

[2] Ms. Gilchrist had testified at Mr. Mitchell's trial that she had conducted blood tests which showed that blood found on the victim's clothing were consistent with both Mr. Mitchell and the victim's boyfriend. However, Judge Thompson found that even this testimony was, at least, "misleading," in light of her testimony during the evidentiary hearing on Mr. Mitchell's habeas corpus petition that her blood tests excluded Mr. Mitchell as the donor of the samples she tested. 150 F. Supp. 2d at 1226.

murder trial of Alfred Brian Mitchell.[3] The *Mitchell* opinion also cited several other cases in which Ms. Gilchrist's testimony or forensic work had been criticized.[4]

Following the publication of the *Mitchell* opinion, Chief Berry ordered an investigation into Ms. Gilchrist's employment-related conduct. The extensive investigation revealed discrepancies in other cases in which Ms. Gilchrist had testified.

During the course of the investigation, police department officials became aware of a discrepancy in Ms. Gilchrist's testimony in the case of Jeffrey Todd Pierce, who was convicted of rape in 1986. In February 2001,

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[3] As Defendant Berry points out in his reply brief, in the *Mitchell* case, Ms. Gilchrist not only gave false and misleading testimony; she was in possession of – and withheld – evidence which exonerated Mr. Mitchell on his convictions for rape, oral and anal sodomy.

[4] In Mitchell, supra, Judge Thompson cited *McCarty v. State of Oklahoma*, 765 P. 2d 1215, 1217-19 (Okla. Crim. App. 1988) (Gilchrist's delay in disclosing hair evidence to the defense was "inexcusable" and deprived defendant of a fair trial; her report regarding her examination of evidence was "at best incomplete, and at worst inaccurate and misleading," resulting in "trial by ambush." Gilchrist gave improper opinion which she was unquestionably unqualified to give and which was not supported by the state of the art of forensic science; professional organization had found that Gilchrist had violated its ethical code); *Fox v. State of Oklahoma*, 779 F. 2d 562, 571-572 (Okla. Crim. App. 1989) (Gilchrist testified to a conclusion which was not scientifically supported.); *Pierce v. State of Oklahoma*, 786 P.2d 1255, 1261 (Okla. Crim. App. 1990) (Gilchrist violated trial court's order to forward evidence to laboratory designated by defense.); *Miller v. State of Oklahoma*, 809 P. 2d 1317, 1319-1320 (Okla. Crim. App.1991) (Gilchrist did not transmit evidence to defense expert until two weeks after court-ordered deadline and six and one-half days before trial. Gilchrist's report omitted crucial conclusion. The significant omission, together with State's extreme tardiness in complying with discovery order, "resulted in trial by ambush on a very critical piece of evidence.").

Defendant Laura Schile, a forensic chemist assigned to the police department's serology lab, examined the evidence in the Jeffrey Todd Pierce ease at the request of the Oklahoma Indigent Defense System. (Defendant City's Exhibit No. 38). Ms. Schile examined certain slides which Ms. Gilchrist had testified contained semen and sperm, and could find sperm on only one of them. At Defendant Schile's request, the City's three other forensic chemists reviewed the same slides, and they, too, could find evidence of sperm on only one. (Defendant City's Exhibit No. 38). Six of the *Pierce* slides were submitted to the Oklahoma State Bureau of Investigation ("OSBI") for further review. On February 20, 2001, OSBI Agent Jamie Yorkston issued a report stating that no sperm was detected on any of the submitted slides. On February 22, 2001, Defendant Berry notified District Attorney Robert Macy of the results of the review of the evidence in the *Pierce* case, and the "inconsistencies in the case analysis" performed by Ms. Gilchrist. (Plaintiff's Exhibit No. 83).

Defendant Berry has offered evidence that in March 2000, while the investigation of Ms. Gilchrist's casework was underway, Ms. Gilchrist nevertheless analyzed hair evidence and wrote a report in a capital murder case without submitting the evidence for peer review as required by department policy. (Exhibit Nos. 39 and 40 to Boshell Report and Attachments).

As a result of the discrepancies found in the OSBI's review of the *Pierce* case slides, Defendant Berry requested the assistance of the Federal Bureau of Investigation in March 2001. (Defendant Berry's Exhibit No. 7). Special Agent Douglas Deedrick of the F. B. I. conducted an independent review of the evidence in eight of Ms. Gilchrist's cases. On April 4, 2001, Special Agent Deedrick

submitted a report to Defendant Berry, which expressed serious concerns about the quality of Ms. Gilchrist's forensic analysis, and the credibility of her testimony in the criminal trials under review.

First, Agent Deedrick's report stated that Ms. Gilchrist's laboratory notes were "often incomplete or inadequate to support the conclusions reached" by Ms. Gilchrist. Agent Deedrick's report also listed errors in identification or interpretation in each of the five cases in which Ms. Gilchrist had used glass microscope slides to make hair or fiber comparisons. Agent Deedrick reported that in one case, Ms. Gilchrist made errors in the comparison of textile fibers, and compounded the error by testifying that the suspect on whose shoes the fibers were found "had to have been associated or had to have been in the home of (the victim)," when such testimony was not supported by the scientific evidence. Agent Deedrick further reported that in several of the cases, Ms. Gilchrist "made statements that went beyond the acceptable limits of forensic science." (Defendant City's Exhibit No. 64). Agent Deedrick recommended that the City establish procedures pertaining to hair and fiber evidence, including a confirmation policy on all hair comparisons and the inclusion of a qualifying statement in all reports where hairs are compared. Agent Deedrick further recommended the establishment or review of training programs and qualification requirements for hair and fiber examiners, and the use of annual proficiency tests for qualified hair and fiber examiners. In addition, Agent Deedrick recommended a review of all criminal cases in which Ms. Gilchrist linked hair or fibers with a suspect or victim, where the evidence was "significant to the outcome of the trial." (City's Exhibit No. 64).

On May 7, 2001, the Oklahoma City Police Department received an analytical report on the *State of Oklahoma v. Pierce* case from Gary C. Harmor, Senior Forensic Serologist of the Serological Research Institute ("SERI"). The SERI analytical report concluded, based on DNA analysis, that the donor of the sperm cells found on the victim's clothing was not Mr. Pierce. (Defendant City's Exhibit No. 37). Mr. Pierce was freed from incarceration, and his conviction and sentence were vacated, based on a finding that he was "factually innocent of committing the crimes for which he was charged and convicted." (Defendant Berry's Exhibit No. 12). On that same date, Ms. Gilchrist was given notice of a predetermination and name-clearing hearing. (Defendant Berry's Exhibit No. 13).

The May 7, 2001 notice of the predetermination hearing advised Ms. Gilchrist of the allegations against her, including laboratory mismanagement, challenges to the credibility of her testimony in various court proceedings and forensic journals, and flawed casework analysis. The notice cited specific provisions of the City's Policies and Procedures Manual which were allegedly violated. (Defendant Berry's Exhibit No. 13). Along with the notice, Ms. Gilchrist was provided with a copy of Captain Byron Boshell's detailed memorandum outlining the results of his investigation of her casework, a copy of the FBI's investigative report, and a report of Captain Boshell's investigation into Ms. Gilchrist's complaint against Defendant Spencer. (Defendant Berry's Exhibit No. 5). At the request of Ms. Gilchrist's attorney, the predetermination hearing was extended for thirty days, then for an additional sixty days. In the interim, the City provided Ms. Gilchrist's attorney with additional documents, and with

the names of the witnesses the City proposed to present at the hearing. (Defendant Berry's Exhibit No. 16).

On July 13, 2001, the Serological Research Institute ("SERI") submitted to Captain Byron Boshell a written report of its serology audit of the Oklahoma City Police Department Crime Laboratory. The SERI audit included a review of Ms. Gilchrist's work in the cases of *State of Oklahoma v. Jeffrey Todd Pierce* and *State of Oklahoma v. Curtis McCarty*. The SERI audit report was highly critical of Ms. Gilchrist's scientific analysis and testimony in both cases. According to the SERI audit report, Ms. Gilchrist's trial testimony in the *Pierce* case was misleading, and demonstrated bias and prejudice against the defendant.[5] The SERI audit report explained how Ms. Gilchrist's testimony in the *Pierce* case was misleading, and why Ms. Gilchrist should have known that her testimony was inaccurate. (Defendant City's Exhibit No. 56).[6] The SERI

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[5] The SERI audit report explained that, based upon a review of the serology results in the *Pierce* case, the only correct conclusion that could be drawn is that the donor of the semen "could be *any male in the population*." According to the SERI report, Ms. Gilchrist's trial testimony in the *Pierce* case "shows a total disregard for the results of her analysis and a prejudice against the defendant." Ms. Gilchrist's answers to questions regarding the presence of semen on the victim's vaginal swab were "misleading." Her answers to questions regarding whether the donor of the semen was a secretor were "erroneous," and not supported by the evidence, Defendant City's Exhibit No. 56, pp. 3-4, emphasis in original.

[6] The SERI audit report states that it appeared from her case notes in the *Pierce* case that Ms. Gilchrist did not determine the concentration of semen on any of the evidence. With no idea as to the concentration of the semen, and with the only ABO typing results matching those expected from the victim (O Secretor), "the only conclusion that she should correctly draw is that the semen donor could be *any* male in the population." The SERI report explained that these interpretation rules were well known and established at the time of Mr. Pierce's trial, and

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audit report identified similar problems with Ms. Gilchrist's work in the *McCarty* case, and found that Ms. Gilchrist's trial testimony demonstrated "a terrible prejudice to the defendant." (Defendant City's Exhibit No. 56, p. 6).[7] The SERI auditors found that while Ms. Gilchrist's laboratory notes appeared to be in order, "her testimony at various places was misleading at best, erroneous, lacking foundation and/or self contradictory." (Defendant City's Exhibit No. 56, p. 9).

Following an extension granted at the request of Ms. Gilchrist's attorney, the predetermination hearing began on August 21, 2001 and lasted eight days. The predetermination was conducted by a Departmental Review Board consisting of Defendants Bill Citty, Deputy Chief of Police; Richard Dawes and Matthew Scott, both chemists; and Defendants Ken McDonald and Johnny Kuhlman, both police officials with the rank of major. Defendant Byron Boshell testified for two and a half days regarding his investigative report and its attachments. The City also called Special Agent Deedrick and police department chemists Laura Schile and Elaine Taylor to testify, and introduced 65 exhibits. Ms. Gilchrist testified for three

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had been taught to Ms. Gilchrist in the Sexual Assault Course conducted at SERI in 1981. Defendant City's Exhibit No. 56, p. 4, emphasis in original.

[7] The SERI audit report found particular fault with Ms. Gilchrist's testimony concerning the presence of seminal fluid in the *McCarty* case. The SERI report quoted Ms. Gilchrist's trial testimony indicating that the particular screening test she used was "specific for seminal acid phosphatase." According to the SERI report, "This is simply incorrect, because the screening test detects acid phosphatase in other body fluids . . . but there is *no* specific test for seminal acid phosphatase." Defendant City's Exhibit No. 56, p. 6.

days, and called former Chief of Police Dave McBride as a witness, introducing 97 exhibits. In the predetermination hearing, Ms. Gilchrist admitted that she had given inconsistent testimony in some high-profile rape and murder cases, as to whether limb hairs are suitable for meaningful scientific comparison. (Transcript of Predetermination hearing, pp. 146-149, 151-156).[8]

On September 21, 2001, the Departmental Review Board issued its report recommending that Ms. Gilchrist's employment be terminated. Specifically, the Departmental Review Board found that Ms. Gilchrist had mismanaged the Police Department's forensic laboratory.[9] In addition,

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[8] At her predetermination hearing, Ms. Gilchrist was asked about her testimony in the Malcolm Rent Johnson capital murder case, in which she testified that she had "determined" that a limb hair found at the crime scene was "microscopically consistent" with a known limb hair from the defendant. (Transcript of pre-determination hearing, p. 147). As the questioning continued, Ms. Gilchrist was asked about her earlier testimony in the Jeffrey Todd Pierce case, that we don't do examinations using limb hair, because they don't all afford enough differentiation for us to make any valid conclusions." (Transcript of predetermination hearing, p. 148).

[9] The Departmental Review Board Report found that Ms. Gilchrist was "irresponsible" in the purchase of a speed vacuum and a hybridization oven for the City's DNA laboratory. The evidence at the hearing indicated that these items of equipment could be used only for the "RFLP DNA" process, which was not the process the City intended to use in its DNA laboratory. Several years after Ms. Gilchrist approved its purchase, this equipment had never been used. In addition, the City's evidence showed that Ms. Gilchrist purchased a large number of pipetters for the laboratory, greatly in excess of the number the City would need to operate its DNA laboratory. The City also offered evidence that Ms. Gilchrist purchased proficiency tests for employees of the serology laboratory over a period of ten years, which Ms. Gilchrist knew were not being used. (Departmental Review Board Report, pp. 3-4). The Departmental Review Board found that in managing the laboratory, Ms. Gilchrist had been dishonest in certain communications

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the Departmental Review Board Report recounted several criminal cases in which the appellate courts had strongly criticized Ms. Gilchrist for testifying in a misleading manner,[10] or for delaying the production of evidence to the

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with her supervisors, and that she had knowingly failed to testify to the whole truth with regard to certain criminal cases. (Departmental Review Board Report, pp. 4-6). The Board further found in its report that Ms. Gilchrist had mishandled evidence used in the Curtis McCarty criminal trial, leading to possible contamination of the evidence. (Departmental Review Board Report, p. 7). The report further states that as the laboratory supervisor, Ms. Gilchrist failed to respond appropriately when the freezer malfunctioned, and that "many cases were compromised" as a result. (Departmental Review Board Report, p. 7). The Board's report further states that Ms. Gilchrist made offensive remarks and writings in criminal cases involving homosexuals. (Departmental Review Board Report, p. 8). The report further states that over a period of years Ms. Gilchrist continued to expend city funds to purchase proficiency testing materials, although she had failed to implement and enforce proper procedures for proficiency testing. The Departmental Review Board Report concluded that by continuing to purchase the proficiency testing materials, Ms. Gilchrist "therefore gave the false impression proficiency testing was being done." (Departmental Review Board Report, pp. 9-10).

[10] Citing the SERI audit report, the Board report noted that in the Pierce trial, Ms. Gilchrist implied that the semen donor was one of a small percentage of the population which included Mr. Pierce, when, in fact, the semen donor could have been any male in the population. (Departmental Review Board Report, p. 11). The report further noted that the Oklahoma Court of Criminal Appeals concluded that Ms. Gilchrist's opinion testimony in the murder trial of James Ables, that the retrieved hairs "matched" the sample taken from Mr. Ables, constituted reversible error and required a new trial, (Id.). The Board's report further noted that the Oklahoma Court of Criminal Appeals had been highly critical of Ms. Gilchrist's testimony and scientific analysis in the criminal cases against Mark Fowler and Bill Fox, Curtis McCarty, and Elmer Miller. In addition, Judge Thompson of this District was highly critical of Ms. Gilchrist's testimony in the criminal case against Alfred Brian Mitchell. (Departmental Review Board Report, pp. 11-13). Not only did Ms. Gilchrist's testimony concerning hair analysis exceed acceptable standards of forensic science, it was

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defense.[11] In addition, the Departmental Review Board report found that Ms. Gilchrist's casework in several other criminal cases had been found to be flawed[12] or improperly

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described in some cases as "misleading," and in the case of Alfred Brian Mitchell as "false."

[11] The Departmental Review Board Report stated that in the Jeffrey Todd Pierce case, the Oklahoma Court of Criminal Appeals found that Ms. Gilchrist had "absolutely violated the terms of a court order" requiring her to make evidence available to the defense. The Departmental Review Board's report also pointed out that in the Curtis McCarty case, the Oklahoma Court of Criminal Appeals criticized Ms. Gilchrist for her unexplained delay in producing evidence pursuant to a court order. The court characterized Ms. Gilchrist's tardiness in producing the evidence only three days before trial as "inexcusable" (Departmental Review Board Report, p. 11). In the case of Elmer Lee Miller, the Oklahoma Court of Criminal Appeals found that Ms. Gilchrist's delay in disclosing the hair evidence and forensic report, approximately two weeks after the deadline imposed by the trial judge, prevented the defense expert from adequately examining the physical evidence. This delay, coupled with a "significant omission in Ms. Gilchrist's report," resulted in "trial by ambush on a very critical piece of evidence," and required a reversal of Mr. McCarty's conviction. (Departmental Review Board Report, p. 12).

[12] The Departmental Review Board report found flawed forensic analysis in Ms. Gilchrist's work on the following cases:

a) *Jeffrey Todd Pierce, 1986.* Ms. Gilchrist's forensic report identified certain slides containing spermatozoa. Subsequent analysis of these slides by four Police Department chemists, chemists from the Oklahoma State Bureau of Investigation and a forensic expert for the FBI revealed that spermatozoa was present on only one of the slides, and that the others did not contain spermatozoa as reported by Ms. Gilchrist. At Ms. Gilchrist's pre-determination hearing, she and FBI Agent Deedrick agreed that the biological evidence should still be present on the slides if they were mounted properly.

b) *Harold Weathery, 1984.* FBI Agent Deedrick reported that the synthetic fibers found in this case did not exhibit the same microscopic characteristics found by Ms. Gilchrist, and that a slide which Ms. Gilchrist had identified as human hair was, in

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fact, animal hair. At the predetermination hearing, Ms. Gilchrist conceded that the sample was animal hair.

c) *David Bryson, 1983.* In her trial testimony, Ms. Gilchrist identified a pubic hair and head hairs as "consistent" with those of Mr. Bryson. FBI Agent Deedrick's audit report revealed that the hairs submitted as evidence in the case did not, in fact, exhibit the same microscopic characteristics as the known hairs of Mr. Bryson. Agent Deedrick criticized Ms. Gilchrist's trial testimony, saying that Ms. Gilchrist had wrongly implied that hairs are unique to an individual.

d) *Curtis Edward McCarty, 1986.* FBI Agent Deedrick's audit report noted that Ms. Gilchrist had compared recent head hairs known to be from Mr. McCarty to three-year-old head hairs found at the crime scene. Agent Deedrick testified at Ms. Gilchrist's pre-determination hearing that under commonly accepted principles of forensic science, head hairs should not be compared if they are more than a year old.

e) *Alvin Parker, 1985.* Ms. Gilchrist identified ten head hairs as consistent with Mr. Parker's known hairs. FBI Agent Deedrick's report stated that the ten hairs are fragmentary, and are either not suitable for meaningful comparison or are dissimilar to Mr. Parker's known hairs. In his report, Agent Deedrick stated that Ms. Gilchrist's hair comparisions in this case fall far below the acceptable limits of forensic science.

f) *David Lee Dodson (1983).* Agent Deedrick criticized Ms. Gilchrist's use of limb and body hairs for identification purposes at the trial in this case. Agent Deedrick testified at the predetermination hearing that limb and body hairs are not suitable for identification.

g) *Loyd LaFevers* (1985). In June 2000, Ms. Gilchrist reported to Captain Byron Boshell that while attorneys were viewing evidence in the Police Department laboratory, she found a hair slide taken from the shirt of one of the defendants which had never been analyzed. Ms. Gilchrist advised Captain Boshell that this hair was consistent with Mr. LaFever's co-defendant, Randall Cannon. Ms. Gilchrist not only failed to examine this evidence prior to trial, she failed to have it peer-reviewed.

Departmental Review Board Report, pp. 15-18.

documented.[13] Based upon these findings, the Board unanimously recommended that Ms. Gilchrist's employment be terminated. (Departmental Review Board report, p. 21). On September 25, 2001, after reviewing the Departmental Review Board's report, Defendant Berry terminated Ms. Gilchrist's employment. (Defendant Berry's Exhibit No. 17).

On October 5, 2001, Ms. Gilchrist's attorney filed an internal grievance challenging her termination. On October 25, 2001, a hearing was conducted on Ms. Gilchrist's grievance by a grievance review board consisting of City employees not assigned to the police department. Ms. Gilchrist was again represented by counsel at this hearing. On November 5, 2001, the grievance review board recommended to Defendant James Couch that Ms. Gilchrist's grievance be denied, and her termination upheld. Defendant Couch reviewed the findings of the

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[13] The Departmental Review Board Report found that Ms. Gilchrist had failed to properly document her analysis in the following cases:

a) *Loyd LaFevers (1985).* The report noted that Ms. Gilchrist had failed to document her hair comparison findings in her original report in March 1986.

b) *David Bryson (1983).* The Departmental Review Board report noted that Ms. Gilchrist was asked about a missing swab taken front a crack pipe. Ms. Gilchrist responded that this evidence was used up during her analysis, and was not missing. However, there was no documentation of the depletion of this evidence.

c) *Curtis McCarty (1986).* The Departmental Review Board report noted a discrepancy between Ms. Gilchrist's original notes and her official forensic report concerning the number of pubic hairs and body hairs found on the victim's body.

Departmental Review Board Report, p. 18.

departmental review board and those of the grievance review board, and upheld Ms. Gilchrist's termination.

II. First Amendment Retaliation Claim – Complaint Against Major Garold Spencer.

The moving Defendants seek summary judgment on Ms. Gilchrist's First Amendment retaliation claim related to her complaint against Defendant Garold Spencer. It is undisputed that Ms. Gilchrist reported to Defendant Berry an allegation of misconduct on the part of Major Spencer involving a female vendor in June, 1998. (Plaintiff's Exhibit No. 38). Ms. Gilchrist acknowledged that she had no first-hand knowledge of the alleged incident, and that she was merely reporting what the vendor had told her.

In order to state a claim under Title 42 U.S.C. § 1983 for First Amendment retaliation, a plaintiff must show that he or she engaged in protected speech, i.e., speech addressing a matter of public concern, and second, that the plaintiffs interest in free expression outweighs the governmental employer's interest in regulating the speech of its employees in order to maintain an efficient work-place. *See Worrell v. Henry*, 219 F. 3d 1197 (10th Cir. 2000), *cert. denied,* 533 U.S. 916, 121 S. Ct. 2521, 150 L. Ed. 2d 693 (2000); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). If the speech is thus protected, the court must then consider whether the protected speech is a substantial or motivating factor in the challenged governmental action. *Worrell v. Henry, supra.* If so, the defendant must be given the opportunity to show that the same action would have been taken even in the absence of the protected speech. *Id.*

Ms. Gilchrist has failed to show that her report to Defendant Berry of misconduct by Defendant Spencer, in June 1998, was a substantial or motivating factor in the Departmental Review Board's recommendation that her employment be terminated, in Defendant Berry's decision to terminate her employment, or Defendant Couch's decision to uphold her termination in the fall of 2001. *Butler v. City of Prairie Village,* 172 F. 3d 736, 746 (10th Cir. 1999) (Mere temporal proximity of employee's protected speech to his termination was not sufficient to establish a retaliatory motive in support of his First Amendment claim). The lapse of more than three years between Ms. Gilchrist's complaint of the treatment of Ms. Roby and the termination of Ms. Gilchrist's employment is undisputed. Ms. Gilchrist has offered no other evidence suggesting that the termination of her employment was motivated by retaliation for her complaint against Defendant Spencer. Ms. Gilchrist's complaint of misconduct by Defendant Spencer did not result in any discipline against him, and did not implicate Defendant Berry, Defendant Couch, or any of the Board Member Defendants, which suggests that Ms. Gilchrist's complaint would not have motivated them to retaliate against Ms. Gilchrist. *Butler v. City of Prairie Village, Kansas*, 172 F. 3d at 745. Accordingly, the Court finds that Defendant Berry, Defendant Couch, the Board Member Defendants and the City of Oklahoma City are entitled to summary judgment on Ms. Gilchrist's First Amendment retaliation claim arising out of her complaint against Defendant Garold Spencer.

III. First Amendment Retaliation Claim – Expert Testimony in Criminal Cases.

The moving Defendants seek summary judgment on Ms. Gilchrist's First Amendment claim insofar as it is based upon a theory of retaliation for her expert testimony in seven criminal cases. Ms. Gilchrist contends that the Departmental Review Board's report "expressly stated that the primary reason for [her] termination was her testimony in various court proceedings," specifically, the criminal trials involving: 1) James Ables, 2) Harold Weatherby, 3) Elmer Lee Miller, 4) Jeffrey Todd Pierce, 5) Mark Fowler and Bill Fox, 6) Curtis McCarty, and 7) Alfred Brian Mitchell. Citing *Worrell v. Henry,* 219 F. 3d 1197 (10th Cir. 2000), *cert. denied,* 533 U.S. 916, 121 S. Ct. 2521, 150 L. Ed. 2d 693 (2000), Ms. Gilchrist contends that her testimony in these cases is entitled to First Amendment protection.[14]

Ms. Gilchrist has failed to demonstrate that the testimony upon which she bases her First Amendment claim was *truthful*, and thus warranting First Amendment protection. Although public employees giving sworn testimony in a judicial proceeding have a compelling interest in testifying truthfully, *see Wright v. Illinois Department of Children & Family Services*, 40 F. 3d 1492

[14] The Court notes that in *Worrell, supra,* the Tenth Circuit emphasized that First Amendment protection of public employees' testimony is not absolute, reasoning that there are instances in which the government's interests as an employer outweighs the employees' interests in free expression and the policy of encouraging truthful and uninhibited testimony. The court explained that a public employee's testimony may impair discipline by supervisors or harmony among coworkers, may undermine close working relationships based on loyalty and confidence, and may impede the performance of an employee's duties or the regular operations of the enterprise.

(7th Cir. 1994); *Copp v. Unified School District No. 501*, 882 F. 2d 1547, 1550 (10th Cir. 1989), Ms. Gilchrist has not shown that this interest extends to giving misleading or untruthful testimony.[15] The extent of protection to be afforded to Ms. Gilchrist's testimony depends upon, among other things, the truthfulness of that testimony. *Worrell v. Henry,* 219 F. 3d 1197 (10th Cir. 2000). Ms. Gilchrist has offered no evidence that the testimony found to be untrue in the *Mitchell* case was true.[16] Furthermore, as the Tenth Circuit has explained, if an employee's supervisors reasonably believed, after an adequate investigation, that her testimony was false, even

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[15] The Board Member Defendants quote the following language from *Worrell, supra*:

> "Absent such protection, employers seeking to silence truthful testimony could present employees with a difficult choice, 'Employees could either testify truthfully and lose their jobs or could lie to the tribunal and protect their job security.' Either choice would come at too high a price, 'Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth.' On the other hand. '[t]hose unwilling or unable to risk unemployment would scuttle our efforts to arrive at the truth. Affording constitutional protection to the truthful testimony of public employees protects both employees interest in free expression and the judicial system's interest in arriving at the truth."

Worrell v. Henry, 219 F. 3d 1197, 1205 (10th Cir. 2000), *quoting Johnston v. Harris County Flood Control District,* 869 F. 2d 1565 (5th Cir. 1989). This reasoning clearly indicates that the First Amendment protection afforded to public employees testifying in judicial proceedings applies to *truthful* testimony.

[16] In *Mitchell*, Judge Thompson found that Ms. Gilchrist had falsely testified that the DNA analysis performed by the FBI was 'inconclusive' as to Mr. Mitchell, when in fact she knew that DNA testing of semen found on the victim's clothing showed at least a preliminary match with another individual, and that Mr. Mitchell's DNA had not been found on the victim's clothing. 150 F. Supp. 2d 1194, 1226, 1228-1229.

if it actually was true, they could punish her on the basis of their investigation. *Gilchrist v. Citty*, 71 Fed. Appx. 1 (10 Cir. 2003); *Wright v. Illinois Department of Children & Family Services,* 40 F. 3d 1492, 1506 (7th Cir. 1994). *See also Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (Before a government employer can discharge an employee for unprotected speech, it must undertake reasonable investigation to determine what the speech actually was, and must in good faith believe the facts on which it purports to act).[17]

The moving Defendants have pointed to ample, undisputed evidence that Ms. Gilchrist's employment was terminated based on a reasonable belief that she had given false or misleading testimony, or improperly withheld evidence, in the seven criminal cases cited in the Departmental Review Board Report. (Plaintiff's Exhibit No. 83).[18]

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[17] Defendant Couch cites *Waters v. Churchill, supra,* arguing that he is entitled to summary judgment on Ms. Gilchrist's First Amendment retaliation claim because when he upheld her termination, he reasonably believed the judges' opinions, and the reports and testimony of other scientists that Ms. Gilchrist had given testimony which was false and misleading, and had made analysis of evidence which could not be duplicated. Ms. Gilchrist argues that *Waters v. Churchill* is not binding authority because it is a plurality decision. The Defendants have cited ample legal authority to support summary judgment in their favor, based upon undisputed evidence that the Defendants terminated Ms. Gilchrist's employment based on a reasonable belief that she had given false or misleading testimony in certain criminal cases, that her scientific analysis was flawed in several cases, and for other legitimate, non-retaliatory reasons.

[18] As explained in the Departmental Review Board Report, the Oklahoma Court of Criminal Appeals reversed the defendants' convictions in the Ables and McCarty cases, because Ms. Gilchrist had given improper opinion testimony, implying that she had concluded based on hair comparison that the defendants were guilty as charged when such conclusions were not supported by accepted principles of forensic science. Similarly, in the trial of Harold Weatherly, Ms. Gilchrist

(Continued on following page)

The Defendants' evidence further shows that Ms. Gilchrist's termination was prompted by an extensive investigation into her courtroom testimony and casework, conducted with the assistance of outside agencies. Even if

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testified that the person wearing Mr. Weatherly's shoes "had to have been associated or had to have been in the [victim's home] either during the crime or after the crime occurred." Again, this testimony was well beyond the accepted limits of forensic science. Furthermore, as Special Agent Deedrick explained in his report, none of the fibers found on Mr. Weatherly's shoe actually "matched" the fibers found at the crime scene. Contrary to Ms. Gilchrist's testimony in the Weatherly case, it was "obvious" to Special Agent Deedrick that the synthetic fibers examined did not exhibit the same microscopic characteristics. The Oklahoma Court of Criminal Appeals reversed the conviction of Elmer Lee Miller, in part because of Ms. Gilchrist's tardiness in disclosing hair evidence, and in part because her trial testimony relied on a "unique characteristic" of the defendant's hair which had not been disclosed in Ms. Gilchrist's pre-trial forensic report. According to the appellate court, Ms. Gilchrist's conduct in the case resulted in "trial by ambush on a very critical piece of evidence," and required a new trial. The Departmental Review Board's criticism of Ms. Gilchrist's conduct in the case of Jeffrey Todd Pierce was twofold: first, that she failed to comply with the trial court's order to submit the hair evidence to the SERI laboratory, and second, that her trial testimony concerning the presence of, and the source of, semen on a swab obtained from the victim was misleading. (Departmental Review Board report, pp. 10-11). The Departmental Review Board report also cited the opinion of the Oklahoma Court of Criminal Appeals criticizing Ms. Gilchrist's hair analysis testimony at the murder trial of Mark Fowler and Bill Fox as "improper" and lacking scientific weight. The Departmental Review Board report also cited Judge Thompson's opinion in the habeas corpus proceeding brought by Alfred Brian Mitchell, finding that Ms. Gilchrist's testimony was "at least misleading," and overstated the significance of hair comparisons. The Departmental Review Board report further noted that Ms. Gilchrist had withheld important evidence from the defense, excluding the defendant as the source of DNA found on the victim's clothing. (Departmental Review Board report, pp. 13-14). The Departmental Review Board report further cited Agent Deedrick's statement that Ms. Gilchrist's testimony in the Mitchell case overstated the significance of hair comparisons. (Departmental Review Board Report, p. 13).

the questioned testimony were actually true, the termination of Ms. Gilchrist's employment on the basis of an ample investigation and a full evidentiary hearing did not violate her First Amendment rights. *Id.*[19]

The Court notes that Ms. Gilchrist has focused intently upon the fact that her testimony in each of the subject criminal cases was more than a decade old at the time of her termination. The evidence indicates that Defendant Berry ordered Defendant Boshell to begin an inquiry into Ms. Gilchrist's casework and courtroom testimony in November 1999, shortly after the publication of Judge Thompson's opinion in *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W. D. Okla. 1999). Although greater vigilance in monitoring Ms. Gilchrist's work might have been warranted, the delay in investigating Ms. Gilchrist's case work does not suggest that her termination was retaliatory in nature. Nor has Ms. Gilchrist shown that the delay prejudiced her in responding to the allegations against her, or in presenting a defense at her predetermination hearing.

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[19] The Court has previously denied motions to dismiss by some of the Defendants, finding, among other things, that Ms. Gilchrist had adequately pled facts showing that her testimony in the seven criminal cases was truthful, and involved a matter of public concern. Constrained by the pleadings, the Court found, for purposes of those Rule 12(b)(6) motions, that Ms. Gilchrist had adequately pled facts showing that her testimony in the seven criminal cases was entitled to First Amendment protection. The Tenth Circuit affirmed. *Gilchrist v. City*, 71 Fed. Appx. 1 (10th Cir. 2003). The current motion, brought under Rule 56, requires Ms. Gilchrist to respond not merely with allegations of specific facts, but with evidence sufficient to raise a genuine issue of material fact. Having had ample opportunity to develop the record, Ms. Gilchrist has failed to present sufficient evidence in support of her First Amendment claim against Defendant Berry.

Ms. Gilchrist argues that the Defendants have failed to meet the second prong of the *Pickering* balancing test because they have not shown an "actual disruption of services" resulting from her testimony. *See Pickering v. Board of Education of Township High School District No. 205,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). This argument misapplies the *Pickering* balancing analysis. As explained above, while a public employee may have a First Amendment right to give truthful testimony in a criminal proceeding, the employee does not have a right protected by the First Amendment to give false or misleading testimony against a criminal defendant. *Wright v. Illinois Department of Children & Family Services,* 40 F. 3d 1492 (7th Cir. 1994); *Copp v. Unified School District No. 501,* 882 F. 2d 1547, 1550 (10th Cir. 1989) Such testimony is simply not protected by the First Amendment. Furthermore, to the extent that a showing of actual disruption is necessary, the Defendants have made an ample showing of such disruption with evidence indicating that Ms. Gilchrist's false or misleading testimony resulted in widespread criticism from the courts, and the conviction of at least one defendant who was actually innocent of the crime charged. In the *McCarty* case, Ms. Gilchrist's challenged testimony, along with other errors, required a retrial. *See McCarty v. State of Oklahoma*, 765 P. 2d 1215, 1219 (Okla. Crim. App. 1988). It may reasonably be presumed that these events were, and would continue to be, disruptive to the operation of the City's forensic laboratory. *Accord, Jantzen v. Hawkins*, 188 F. 3d 1247 (10th Cir. 1999) (Requirement of showing actual disruption may be met by an employer's reasonable predictions of disruption if based on specific evidence).

Ms. Gilchrist next argues that her testimony was protected unless it was knowingly or recklessly false, citing *Pickering v. Board of Education of Township High School*, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). As set forth above, those cases which have afforded First Amendment protection to the testimony of public employees have expressly stated that such protection extends to "truthful testimony." The Court finds no legal support for Ms. Gilchrist's argument that untruthful testimony is nevertheless protected unless the defendant makes a showing that it was knowingly or recklessly false.[20] The Defendants have adequately shown that they reasonably believed Ms. Gilchrist's testimony to be untruthful; thus, the Defendants were entitled to discharge her. *Wright v. Illinois Department of Children & Family Services*, 40 F. 3d 1492, 1506 (7th Cir. 1994). *See also Waters v. Churchill*, 511 U. S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). Moreover, to the extent that knowledge of falsity or reckless is required, the Defendants have offered undisputed evidence showing that Ms. Gilchrist knowingly or recklessly gave false testimony in the *Mitchell* case.

The Defendants argue that even if Ms. Gilchrist's testimony were protected, they would have terminated her employment in any event for several other reasons.

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[20] The suggestion that untruthful testimony is protected in the absence of a showing of knowing or reckless falsity is particularly troubling in the present context, i.e., where a forensic expert repeatedly testifies beyond the scope of accepted principles of forensic science, that a defendant *is* the source of certain physical evidence found on the victim or at the crime scene. A governmental employer should not be required to make a further showing that the discharged employee's testimony was knowingly or recklessly false.

Worrell v. Henry, 219 F. 3d 1197 (10th Cir. 2000) (If the speech is protected, and is found to be a motivating factor in the challenged governmental action, the defendant must be given an opportunity to show that the same action would have been taken even in the absence of the protected speech). The Departmental Review Board recommended that Ms. Gilchrist's employment be terminated for laboratory mismanagement, as well as "court challenges" and flawed casework analysis. The Departmental Review Board found that Ms. Gilchrist had mismanaged the police department's forensic lab by making inappropriate expenditures. Ms. Gilchrist alleges that she "did not mismanage the laboratory by making inappropriate expenditures because [she] did not manage the laboratory." (Ms. Gilchrist's brief in response to Board Member Defendants' motion for summary judgment, p. 2). Ms. Gilchrist contends that following her promotion to Chemist Supervisor in 1990, the laboratory was managed by commissioned police officers. Ms. Gilchrist contends that the commissioned officers who managed the laboratory approved all of the expenditures in question, and that she merely submitted purchase request forms for approval. The Defendants have countered this assertion with evidence that Ms. Gilchrist has previously admitted that she was involved in the purchase of equipment and supplies for the D. N. A. Laboratory after her promotion in 1990.[21]

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[21] Ms. Gilchrist wrote, in a memorandum to Deputy Chief Bob Jones on June 4, 1999:

> "In June I began ordering the equipment and some of the supplies for the DNA Lab. . . . By June 1995, I had spent a total of $188,561.05 on equipment and supplies. . . . In August 1996, $15,000.00 was put in place for me to buy the typing kits, additional equipment and other chemicals and reagents needed to perform the tests."

Attachment No. 1 to Boshell Memorandum.

In addition, the Defendants have shown that Ms. Gilchrist and all other chemists in the police department were specifically instructed by Captain Boshell that they must have their forensic case work peer reviewed.[22] Although Ms. Gilchrist alleges that she has not performed any new forensic work since 1994, the undisputed evidence shows that Ms. Gilchrist did, in fact, perform hair analysis in the case of Loyd LaFevers in March 2000, and that she did not have this analysis peer reviewed.[23] In addition, Ms. Gilchrist repeatedly failed to send forensic evidence to defense counsel until the eve of trial, at which time a meaningful analysis could not be obtained by the defense. This practice led to strong criticism of Ms. Gilchrist in several judicial opinions, and in some instances, the reversal of criminal convictions.[24] The Court concludes that the Defendants have adequately shown, by undisputed evidence, that they would have terminated Ms. Gilchrist's employment in the absence of her challenged testimony in the subject criminal cases.[25]

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[22] Ms. Gilchrist points out that Captain Boshell's memorandum mandating peer reviews was addressed to Melissa Keith, and not to her. It is undisputed, however, that this memo was given to all chemists in the department, including Ms. Gilchrist.

[23] See Attachment 39 to Boshell Memorandum.

[24] *State of Oklahoma v. Miller*, 809 P. 2d 1317 (Okla. Crim. App. 1991) (Ms. Gilchrist's omission in forensic report and delay in sending forensic evidence to the defense resulted in "trial by ambush" and required reversal); *McCarty v. State of Oklahoma*, 765 P.2d 1215 (Okla. Crim. App. 1988) (Significant omission in Ms. Gilchrist's forensic report and delay in mailing slides to defense forensic expert resulted in trial by ambush and required reversal); *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W. D. Okla. 1999).

[25] The Defendants assert additional reasons for which they would have terminated Ms. Gilchrist's employment, but some of these are disputed.

The moving Defendants are entitled to summary judgment on Ms. Gilchrist's First Amendment retaliation claim arising out of her testimony in the seven specified criminal cases.

IV. Conspiracy Claim.

Defendants Berry and the City of Oklahoma City move for summary judgment on Ms. Gilchrist's Title 42 U. S. C. § 1983 conspiracy claim[26] To recover under her Section 1983 conspiracy claim, Ms. Gilchrist must prove both a conspiracy, and an actual deprivation of rights secured under the Constitution and laws of the United States. *Dixon v. City of Lawton,* 898 F. 2d 1443, 1449 (10th Cir. 1998); *Earle v. Benoit,* 850 F. 2d 836, 845 (1st Cir. 1988); *Villanueva v. McInnis,* 723 F. 2d 414, 418-419 (5th Cir. 1984).

Ms. Gilchrist alleges, in her response brief, that Defendant Berry "ordered an investigation into [her] employment conduct." (Response brief, p. 19). She further alleges that Defendants Boshell, Jones and Spencer conspired to conduct a secret investigation of her "entire twenty year career," concentrating on her constitutionally protected expert testimony in certain criminal cases, all of which were over a decade old. (*Id.*). Ms. Gilchrist contends

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[26] Ms. Gilchrist bases her conspiracy claim on Section 1983, rather than Title 42 U. S. C. § 1985 (3). A plaintiff may assert a conspiracy claim under Section 1983, by showing both a conspiracy and a deprivation of a federally protected right under color of state law, where the plaintiff does not wish to rely exclusively on Section 1985 (3), with its requirement of class-based, discriminatory animus. *Klingele v. Eikenberry*, 849 F. 2d 409, 413 (9th Cir. 1988); *Helton v. Clements*, 832 F. 2d 332, 338 (5th Cir. 1987); *Harrison v. Springdale Water & Sewer Commission,* 780 F. 2d 1422, 1430 n. 14 (8th Cir. 1986).

that Defendant Berry is liable because he "ratified" the conspiracy between Boshell, Jones and Spencer by terminating her employment on the basis of a "secret" investigation.

Ms. Gilchrist's focus upon the "secrecy" or the confidential nature of Defendant Boshell's investigation is misplaced. Ms. Gilchrist was given an ample notice of the results of the investigation and the accusations against her, and ample opportunity to respond prior to imposition of any disciplinary measures. Following the Departmental Review Board hearing, Ms. Gilchrist was afforded an opportunity to appeal the Board's recommendation to terminate her employment through the police department's grievance procedure. The Grievance Review Board conducted another hearing, and recommended that the Departmental Review Board's recommendation be upheld. At both stages, Ms. Gilchrist was represented by counsel. Ms. Gilchrist has not shown that the "secrecy" of the investigation deprived her of due process, or any other federally protected right. Nor has she shown that the termination of her employment violated her right to protected speech under the First Amendment. Because Ms. Gilchrist has not demonstrated an actual deprivation of federally protected rights, both Defendant Berry and Defendant City of Oklahoma City are entitled to summary judgment on her conspiracy claim. *Accord, Dixon v. City of Lawton,* 898 F. 2d 1443, 1449 (10th Cir. 1998).[27]

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[27] The Defendant City of Oklahoma City seeks summary judgment on Ms. Gilchrist's conspiracy claim on the ground that, as a municipality, it lacks the requisite *mens rea* to be liable for a conspiracy. City's brief in support of motion for summary judgment, p. 12, *citing Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W. D. Okla. 1986) (City

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V. Liberty Interest Claim.

Defendants Berry and the City of Oklahoma City seek summary judgment on Ms. Gilchrist's Section 1983 claim for a deprivation of her liberty interest in her good name and reputation. In order to state such a claim, a plaintiff must show: 1) That the defendant made statements impugning the plaintiff's good name, reputation, honor or integrity; 2) That the statement was false; 3) That the statement occurred in the course of terminating the plaintiff, or the statement foreclosed other employment opportunities; and 4) That the statement was published. *Stidham v. Peace Officer Standards and Training,* 265 F. 3d 1144, 1153 (10th Cir. 2001); *Workman v. Jordan,* 32 F. 3d 475, 481 (10th Cir. 1994).

Ms. Gilchrist bases her liberty interest claim upon the disclosure of Defendant Boshell's January 16, 2001 memorandum, and the disclosure of the April 4, 2001 report of Special Agent Deedrick of the Federal Bureau of Investigation, and that Agent Deedrick's report falsely accused her of committing errors in the interpretation of hair evidence, testifying in court beyond the scope of her expertise, and falling below the acceptable limits of the science of hair comparison. (Response brief, p. 20).

First, the Court notes that, for purposes of Ms. Gilchrist's liberty interest claim, the proper focus is upon those statements which were published, not Defendant Boshell's entire 22-page memorandum, with its hundreds

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lacked necessary *mens rea* or criminal intent to perform an act of racketeering under federal racketeering statute). Since Ms. Gilchrist has not met the other elements of her Section 1983 conspiracy claim, the Court need not address this argument further.

of pages of attachments, and not Agent Deedrick's entire eight-page report. *Stidham v. Peace Officer Standards and Training*, 265 F. 3d 1144 (10th Cir. 2001) (To be actionable, statements which infringe upon a liberty interest in one's good name and reputation must, among other things, be published).

Ms. Gilchrist alleges that Defendant Boshell's report contained false statements regarding mismanagement of the police department's DNA project. Ms. Gilchrist has not identified any specific, published statements regarding her management of the DNA laboratory project which are false or stigmatizing.[28] Instead, she alleges generally that

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[28] The article published in *The Daily Oklahoman* on May 1, 2001 described an incident in which the evidence freezer in the serology laboratory malfunctioned. The article attributed the malfunction to Ms. Glichrist's failure to move boxes away from the freezer when the freezer's alarm was going off, and her failure to defrost the freezer. The article reported that the freezer malfunction resulted in evidence from "hundreds of cases" becoming contaminated, and prompted the temporary closure of the DNA laboratory. The article then included the following statements pertaining to the DNA laboratory:

> "The police departments DNA project began in 1989, but never became a reality under Gilchrist's supervision, even thought the city invested hundreds of thousands of dollars, Boshell wrote. The captain called the DNA laboratory expenditures 'excessive, premature and/or inappropriate.' Taxpayers voted an additional sales tax to help fund the DNA laboratory. 'Tens of thousands of dollars in supplies were purchased and it resulted in no DNA lab.' Boshell wrote. 'Some of these supplies were usable, but many were expired or of no value.' Boshell said the highly untimely and excessive purchase' of a $13,946 piece of computer equipment was a major concern. The equipment was purchased with 1997 federal grant money in June 1999 without Boshell's approval. It is in storage awaiting installation, which may not occur for at least a year, Boshell wrote. 'Rapid changes in computer technology will most likely make this equipment

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statements in Defendant Boshell's report were false because her management of the DNA project "had been endorsed and approved by the consultant reviewing the project, Dr. Roger Kahn," citing attachments 2 and 70 to Defendant Boshell's memorandum. Attachment 2 is an e-mail from Dr. Kahn to "Bo," possibly Defendant Byron Boshell. Attachment 70 is a letter from Dr. Kahn to Defendant Garold Spencer concerning Dr. Kahn's technical review of the City's preparations for its DNA program. Neither of these documents supports Ms. Gilchrist's contention that the published statements regarding her management of the DNA laboratory were false.[29] Neither

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antiquated,' he said. Boshell called Gilchrist's purchase of $13,814 worth of pipetters 'staggering' for the size of the department's laboratory. Pipetters are handheld instruments used to transfer small amounts of liquid. Gilchrist admitted she purchased testing kits for a specific DNA technique that the laboratory never expected to use, the memo stated. In March 2000, lab equipment valued at $50,000 was determined to be unusable. Boshell said some of this equipment was purchased with the intention to perform one type of DNA test, but was discarded when the decision was made to perform a different type. A $6,018 Scimetrics Chest Freezer was purchased on June 2, 1994, but was never turned on. It is uncertain whether it will be operational. Accessories were purchased for $3,770. Allied Steel was paid $2,502 to install the freezer with a crane. The freezer also was stored at Bekins Storage for three months at a cost of $167."

[29] Attachment 70 to Defendant Boshell's memorandum is a report authored by Dr. Kahn following the completion of a "technical review" of the City's preparations for the DNA program preparations. It is clear from its content that Dr. Kahn's report was preliminary in nature, and intended to advise department officials concerning the "preparations" for development of the DNA laboratory. Dr. Kahn's report made recommendations concerning the proposed quality assurance manual, the staffing of the DNA Advisory Board and the laboratory, the adequacy of the facilities, and the need for validation testing. Dr. Kahn's report stated that Ms. Gilchrist had "successfully equipped the

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of these documents address Ms. Gilchrist's management of the funds allocated for the DNA laboratory or the propriety of her purchases of equipment for the DNA laboratory. These documents give no indication that Dr. Kahn conducted an audit of the laboratory funds expended by Ms. Gilchrist, and Ms. Gilchrist points to no evidence that Dr. Kahn "endorsed" or "approved" her equipment purchases.

Similarly, Ms. Gilchrist has not identified any specific, published fact attributed to Agent Deedrick's report which

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lab, mastered the basic analytical methodology, and . . . begun the process of developing the quality assurance program," This report, dated August 31, 1999, expresses Dr. Kahn's opinion of the development of the DNA laboratory as of that time. This report must be read in conjunction with Attachment 2 to Defendant Boshell's memorandum. Attachment 2 is a copy of an e-mail from Dr. Kahn to "Bo" dated October 16, 1999, titled "odd discussion with OSBI lab admin." The text of this e-mail reads, in pertinent part:

> "Earlier this month I was at a meeting with some of the admin staff form the OSBI and I mentioned that I had been to your PD to tech review the DNA program. I told them I had endorsed Joyce's efforts so far but felt that she would benefit from a great deal of contact with the OSBI. They told me they had had a great deal of contact with Joyce over the years and that it seems not (sic) help – that she seems uninterested in working with them. They also mentioned that there had been a series of ethical problems with her forensic work, even so far as to cause censure by the American Academy of Forensic Sciences (by far the largest forensic science organization in the world). I don't know what to make of all this. They urged me to search the website of the Daily Oklahoman for articles about Joyce and to Contact the AAFS for info about the censure. Bo, I'm concerned that you and I are naive to a serious problem. Comments?"

Neither Dr. Kahn's preliminary report nor his e-mail to "Bo" indicate that he has reviewed Ms. Gilchrist's expenditures for the DNA laboratory.

was false, or offered evidence that any of the published facts concerning Agent Deedrick's report were false.[30] Ms. Gilchrist contends Special Agent Deedrick has admitted that his April 4, 2001 report was inaccurate, citing the transcript of the predetermination hearing at

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[30] The newspaper article disclosing the contents of Agent Deedrick's report read, in part, as follows:

> "An Oklahoma City police chemist gave testimony 'that went beyond the acceptable limits of forensic science' or misidentified hair and fibers in at least six criminal cases, an FBI report states. The FBI is recommending a review of all criminal cases where chemist Joyce Gilchrist linked hair or fibers with a suspect or victim and the evidence 'was significant to the outcome of the trial.' The secret FBI report, obtained by The Oklahoman, was presented last week to the Oklahoma City Police Department and Oklahoma County District Attorney Bob Macy. The FBI was checking Gilchrist's work at the request of Oklahoma City Police Chief M. T. Berry. . . . Gilchrist's attorney, Melvin Hall, said his client disagrees with the FBI findings. 'She stands behind her work,' he said. . . . FBI Special Agent Douglas W. Deedrick concluded Gilchrist made errors in six of the eight cases. Conclusions could not be reached in the other two because not enough evidence was available to review. Gilchrist's laboratory notes 'were often incomplete or inadequate to support the conclusions reached,' the report stated. In five criminal cases where hair or fibers were examined by the FBI, Gilchrist made errors in identification or interpretation in all of them, the report states. Hairs linked by Gilchrist to suspects or victims 'were either too limited for meaningful comparison purposes or associated incorrectly,' the report states. In the only case involving fibers, Gilchrist incorrectly identified textile fibers on the victim's clothing and at the crime scene as being consistent with fibers in mud adhering to the suspect's shoe, the FBI said. 'None of the synthetic fibers associated by Gilchrist actually match the fiber samples from the scene,' the report states. Gilchrist's' testimony in several cases also overstated the importance of hair evidence, the FBI said."

Exhibit No. 9 to Defendant Berry's motion for summary judgment.

pages 273-274. At Ms. Gilchrist's predetermination hearing, Special Agent Deedrick clarified an apparent inaccuracy in his report as to the order in which certain statements were made by Ms. Gilchrist in a criminal trial[31] The inaccuracy is not reflected in the newspaper article which disclosed the contents of Agent Deedrick's report, and was not material in any event.[32] Thus, the minor inaccuracy in Agent Deedrick's report does not support Ms. Gilchrist's liberty interest claim. Accordingly, the Court concludes that Ms. Gilchrist has not shown that the published statements regarding her management of the DNA laboratory, or her hair analysis, were false.

Defendant Berry next seeks summary judgment on Ms. Gilchrist's liberty interest claim on the ground that he did not personally participate in the publication of the statements alleged to be false. Defendant Berry has submitted an affidavit in which he specifically denies that he authorized the release of the Boshell report, its attachments, or Agent Deedrick's report. Defendant Berry

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[31] At the predetermination hearing, Ms. Gilchrist's attorney asked Agent Deedrick about some remarks in his report about Ms. Gilchrist's trial testimony in the *Bryson* criminal case. At the *Bryson* trial, the defense attorney asked Ms. Gilchrist what her conclusion would be if he went outside, pulled two hairs from his head and presented them to her. In his report, Agent Deedrick indicated that Ms. Gilchrist responded that "there would be variations in two different hairs off your head, but I would he able to say they came from the same source." In response to questions from Ms. Gilchrist's counsel, Agent Deedrick admitted at the predetermination hearing that this question and response came from two different places in the transcript, and that the response did not immediately follow the question. However, it does not appear from the context that the gap between the question and answer rendered Agent Deedrick's summary of Ms. Gilchrist's testimony false.

[32] See Exhibit No. 10 to Defendant Berry's motion for summary judgment.

further avers in his affidavit that be never released Ms. Gilchrist's name as the chemist being investigated until after she had been given a predetermination hearing and had been terminated. (Exhibit No. 7 to Defendant Berry's motion for summary judgment).[33]

It is well settled that individual liability under Section 1983 must be based on personal involvement in the alleged constitutional violation. *McCarty v. City of Bartlesville*, 8 Fed. Appx. 867 (10th Cir. 2001); *Foote v. Spiegel*, 118 F. 3d 1416, 1423 (10th Cir. 1997). Ms. Gilchrist offers no evidence that Defendant Berry personally leaked the memo to the media, or that he was otherwise personally involved in the publication of the statements she alleges to be false and stigmatizing.[34] Instead, Ms. Gilchrist claims that Defendant Berry is somehow liable because he "personally directed" the deprivation of her liberty interest by ordering Defendant Boshell to conduct an investigation, and by authorizing the Federal Bureau of Investigation to conduct a review of her work. Ms. Gilchrist alleges that Defendant Berry "acquiesced in" the continuing violation of her rights when he approved her termination after reviewing Defendant Boshell's memorandum and the

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[33] Although Defendant Couch and the Board Member Defendants have not made this argument, the Court notes that Ms. Gilchrist has offered no evidence that these Defendants personally participated in the publication of the newspaper articles in question, or in the release of the Boshell memorandum or the F. B. I. report to the press.

[34] Soon after the first newspaper article was published, referring to the F. B. I. report, Defendant Berry ordered the Police Department's Office of Professional Standards to investigate the release of the report. On May 29, 2001 Denise Wenzel of the Office of Professional Standards advised Defendant Berry of her findings. (Defendants' Exhibit No. 10). It is unclear what, if any, disciplinary action was taken against those found to be responsible for leaking the F. B. I. report to the press.

report submitted by the F. B. I. This is clearly not enough to establish a liberty interest claim, in the absence of any evidence that Defendant Berry published either of the documents in question, or leaked them to the media.[35]

Defendants Berry and the City of Oklahoma City alternatively seek summary judgment on Ms. Gilchrist's liberty interest claim on the ground that she received an adequate name-clearing hearing prior to her termination. Ms. Gilchrist argues that her predetermination hearing was inadequate because she was "denied critical information" necessary for her to establish that she was the victim of retaliation" for reporting alleged misconduct on the part of Defendant Spencer. Specifically, Ms. Gilchrist complains that she requested, and did not receive, copies of the internal affairs documents and investigative reports regarding her complaint against Defendant Spencer. The Defendant's evidence indicates that although these documents, dated October 1, 2001, had not been generated by the time of Ms. Gilchrist's predetermination hearing in August and September of 2001, they were provided to Ms. Gilchrist's attorney on October 9, 2001, within days after they were generated. At that time, Ms. Gilchrist's termination was still being reviewed by the Grievance Review Board. Moreover, Ms. Gilchrist's allegation that the documents in question would have proven that she was the victim of retaliation for reporting alleged misconduct by Defendant Boshell is not supported by the evidence.

For all of the reasons set forth above, Defendant Berry and Defendant City of Oklahoma City are entitled to

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[35] As explained above, Ms. Gilchrist has not even shown that the statements published about her in *The Daily Oklahoman* were false.

summary judgment on Ms. Gilchrist's liberty interest claim.[36]

VI. Waiver of Objection to Composition of Board.

The Board Member Defendants seek summary judgment on any claim Ms. Gilchrist may assert based on the composition of the Departmental Review Board. It is undisputed that on May 16, 2001, Ms. Gilchrist and her attorney were advised of the names of the members of the Departmental Review Board which conducted her predetermination hearing. It is further undisputed that on May 18, 2001, Ms. Gilchrist's counsel responded in writing that Ms. Gilchrist had no objection to the composition of the Board. (See Defendant Berry's Exhibit No. 15, "Ms. Gilchrist has no objection to the procedure for conducting the hearing or the composition of the departmental review board.").

Ms. Gilchrist argues that the letter is ineffective to waive her claims against the Board Member Defendants, because these claims arose after the letter was written. Ms. Gilchrist points out that the letter was written before the chairman of the Departmental Review Board, Defendant Bill Citty, refused her request for documents relating

[36] Defendant Berry argues that the Boshell report was leaked to the news media approximately three months prior to Ms. Gilchrist's termination, and that therefore the statements contained in it were not made in the course of her termination. *See Melton v. City of Oklahoma City*, 928 F. 2d 920, 926 (10th Cir. 1991), *cert. denied*, 502 U. S. 906 (1991). In light of the Court's finding that Ms. Gilchrist has not demonstrated that the published statements were false, and the Court's alternative finding that Defendant Berry did not personally participate in the publication of the statements, the Court need not address this argument.

to the investigation of her complaint against Defendant Spencer, before the board issued its unfavorable report, and before her employment was terminated.

The Court interprets the Board Member Defendants' waiver argument to be directed solely to those claims related to the composition of the Departmental Review Board. To that extent, the Court agrees that any claims Ms. Gilchrist may assert based on the composition of the Departmental Review Board are waived, and the Board Member Defendants are entitled to summary judgment. *Accord, McGee v. Boren,* 58 Fed. Appx. 436 (10th Cir. 2003) (Professor whose tenure was abrogated waived his right to assert a due process claims by failing to attend a formal hearing before the university's faculty appeals board.). *See also Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959,* 611 F. 2d 1286, 1290 (9th Cir. 1980) (Alleged bias of an arbitrator was waived where the plaintiff did not object at the time the board of arbitration was convened); *Collins v. United States,* 24 Ct. Cl. 32 (Ct. Cl. 1991) (Navy lieutenant who failed to object to the composition of a qualification review board before the Board for Correction of Naval Records waived any objection to such composition). In light of her affirmative approval of the composition of the Departmental Review Board, the Board Member Defendants are entitled to summary judgment on any claims Ms. Gilchrist may assert based on the composition of the Board.

VII. Qualified Immunity.

Defendant Couch and the Board Member Defendants assert that they are entitled to summary judgment on the basis of qualified immunity. The Court agrees. Ms. Gilchrist

has not demonstrated that these Defendants' actions constituted a violation of clearly established law. *See Harlow v. Fitzgerald,* 457 U. S. 800, 818 (1982); *Saucier v. Katz,* 533 U. S. 194 (2001). Thus, Defendants Couch, Citty, McDonald, Kuhlman, Dawes and Scott are entitled to summary judgment on the claims against them on the ground of qualified immunity.

VIII. Denial of Discovery.

Defendant Bill Citty moves for dismissal of Ms. Gilchrist's claim that he denied her request for discovery of the "results" of an internal affairs investigation of Defendant Garold Spencer. It is undisputed that Ms. Gilchrist and her attorney were aware of the outcome of the investigation into her allegations against Defendant Spencer, i.e., that no disciplinary action was taken against him, prior to her predetermination hearing. It is further undisputed that Ms. Gilchrist's attorney received a copy of the July 15, 1998 memorandum from Lieutenant Phil Coventon to Defendant Berry concerning the Spencer investigation on May 7, 2001, well in advance of the predetermination hearing. (Defendant Berry's Exhibit No. 5).[37] In fact, Ms. Gilchrist offered Lieutenant Coventon's memorandum into evidence at her predetermination hearing. (Plaintiffs Exhibit No. 38). Lieutenant Coventon's memorandum outlined in some detail the allegations against Defendant Spencer, and the information he

[37] On May 16, 2001, Assistant Municipal Counselor Monica L. Coleman denied counsel's request for additional documents pertaining to the Spencer internal affairs investigation on relevance grounds. This is apparently a reference to Defendant Kuhlman's notes. Defendant Berry's Exhibit No. 5.

obtained during his investigation. Additional documents pertaining to the Spencer investigation were provided to Ms. Gilchrist's counsel within days after they were generated, in October 2001, but had not been prepared at the time of her predetermination hearing. (Defendant Berry's Exhibits No. 4 and 6)[38] According to Defendant Citty, at the time of the hearing, the only existing documents pertaining to the Spencer investigation which were not provided to Ms. Gilchrist were Defendant Kuhlman's notes. On May 16, 2001, Assistant Municipal Counselor Monica Coleman declined to produce those on the ground that she did not deem them to be relevant. (Defendant Berry's Exhibit No. 5). Defendant Citty has submitted an affidavit averring that he was advised by Ms. Coleman that she believed the "results" of the Spencer investigation were irrelevant to Ms. Gilchrist's predetermination hearing, and that she was not going to provide additional documents to Ms. Gilchrist. (Board Member Defendants' Exhibit No. 24). Defendant Citty avers that he denied counsel's request for copies of the Spencer internal affairs documents "because of Ms. Coleman's advice and previous denial."

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[38] Defendant Berry's Exhibit No. 4 is a file memorandum by Defendant Johnny Kuhlman dated October 3, 2001, outlining the information he obtained in conjunction with the Spencer investigation, including his conversations with the alleged victim and with Ms. Gilchrist. Defendant's Exhibit No. 6 is a letter dated October 4, 2001 from Defendant M. T. Berry to Defendant Spencer's attorney, Robert E. Manchester, explaining that the person Ms. Gilchrist accused Defendant Spencer of harassing had declined to make a complaint, and "did not feel that she was treated inappropriately." This letter advised Defendant Spencer's counsel that under these circumstances, no disposition could be made, and no letter of exoneration could be given.

Ms. Gilchrist has not shown that the failure to provide her with copies of Defendant Kuhlman's notes or other documents pertaining to the Spencer internal affairs investigation deprived her of due process. She has not shown a reasonable likelihood that these documents would have made a difference in the outcome of her predetermination hearing, or that they were particularly relevant to her predetermination hearing. The Court notes that Ms. Gilchrist offered Lieutenant Coventon's report, containing a summary of the information found in the Spencer internal affairs investigation, into evidence at her predetermination hearing. Ms. Gilchrist has not shown that Defendant Kuhlman's notes from an internal affairs investigation of an incident involving Defendant Spencer some three years earlier are particularly relevant to her predetermination hearing. Ms. Gilchrist was given an explanation of the City's evidence against her, and an opportunity to clear her name and present her side of the story. Thus, to the extent that Ms. Gilchrist had a protected liberty or property interest, her predetermination and name clearing hearing satisfied the requirements of due process. *Montgomery v. City of Ardmore*, 365 F. 3d 926 (10th Cir. 2004) (Pretermination hearing that will satisfy due process requires: (1) oral or written notice of the charges against the employee, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story); *Langley v. Adams County*, 987 F. 2d 1473, 1480 (10th Cir. 1993). Defendant Citty is entitled to summary judgment on this claim.

IX. Conclusion.

The motion for summary judgment of Defendant M. T. Berry is hereby GRANTED. The motion for summary judgment of Defendant James Couch is hereby GRANTED. The motion for summary judgment of Defendants Bill Citty, Ken McDonald, Johnny Kuhlman, Richard Dawes and Matthew Scott is hereby GRANTED. The motion for summary judgment of the City of Oklahoma City is hereby GRANTED.

IT IS SO ORDERED this 7th day of June, 2004.

/s/ David L. Russell
DAVID L. RUSSELL
United States District Judge